SUPREME COURT, U.S.
FILED

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In The

Supreme Court of the United States

October Term, 1997

W.P., *et al.*, Individually and as Representatives of a Class Pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2),

Petitioners,

vs.

PETER VERNIERO, Attorney General of New Jersey, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL Z. BUNCHER
EDWARD L. BAROCAS
New Jersey Office of the Public Defender
Special Hearings Unit
R.J. Hughes Justice Complex
P.O. Box 850
Trenton, New Jersey 08625
(609) 292-7677

JOHN J. GIBBONS
(*Counsel of Record*)
LAWRENCE S. LUSTBERG
JAMES E. RYAN
Crummy, Del Deo, Dolan, Griffinger & Vecchione, P.C.
One Riverfront Plaza
Newark, New Jersey 07102-5497
(973) 596-4500

Attorneys for Petitioners

72463 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

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QUESTIONS PRESENTED

1. In light of the unresolved inconsistency between this Court's decisions in *Austin v. United States*, 509 U.S. 602 (1993) and *United States v. Halper*, 490 U.S. 435 (1989), on the one hand, and *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997) and *United States v. Ursery*, 116 S. Ct. 2135 (1996), on the other, what is the proper test to determine if a civil measure — regardless of the nature of the proceeding used to impose the measure — inflicts punishment for purposes of the Double Jeopardy and Ex Post Facto Clauses of the United States Constitution?

2. Do the community notification provisions of New Jersey's "Megan's Law" impose punishment, such that the retroactive application of those provisions violates the Double Jeopardy and Ex Post Facto Clauses of the United States Constitution?

PARTIES TO THE PROCEEDING

In addition to those listed in the caption to the case, which appears on the cover of this petition, the parties to the proceeding also consist of the following, all of whom were defendants-appellees below and are respondents before this Court:

JEFFREY S. BLITZ, Atlantic County Prosecutor;
CHARLES R. BUCKLEY, Acting Bergen County Prosecutor;
STEPHEN G. RAYMOND, Burlington County Prosecutor;
JOSEPH F. AUDINO, Acting Camden County Prosecutor;
STEPHEN D. MOORE, Cape May County Prosecutor;
CLIFFORD J. MINOR, Essex County Prosecutor;
NEIL S. COOPER, Acting Cumberland County Prosecutor;
HARRIS Y. COTTON, Gloucester County Prosecutor;
CARMEN MESSANO, Hudson County Prosecutor;
SHARON B. RANSAVAGE, Hunterdon County Prosecutor;
MARYANN K. BIELAMOWICZ, Mercer County Prosecutor;
ROBERT W. GLUCK, Middlesex County Prosecutor;
JOHN KAYE, Monmouth County Prosecutor;
W. MICHAEL MURPHY, JR., Morris County Prosecutor;
DANIEL J. CARLUCCIO, Ocean County Prosecutor;
RONALD S. FAVA, Passaic County Prosecutor;
RONALD A. EPSTEIN, Salem County Prosecutor;
MELAINE B. CAMPBELL, Acting Somerset County Prosecutor;
DENNIS O'LEARY, Sussex County Prosecutor;
EDWARD NEAFSEY, Acting Union County Prosecutor; and
JOHN J O'REILLY, Warren County Prosecutor.

An additional plaintiff-appellant, whose case was consolidated with petitioners' for purposes of appeal, was "E.B." (A fictitious name).

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OPINIONS BELOW

The March 15, 1996 opinion and order of the United States District Court for the District of New Jersey, certifying a class and entering a preliminary injunction preventing community notification for any of the class members, is reported at 931 F. Supp. 1187 (D. N.J. 1996) and included as Appendix I. The July 1, 1996 opinion and order of the United States District Court for the District of New Jersey, granting summary judgment to defendants, is reported at 931 F. Supp. 1199 (D. N.J. 1996) and included as Appendix H. The July 9, 1996 order of the United States Court of Appeals for the Third Circuit, staying the order of the district court, continuing an injunction preventing community notification during the pendency of the appeal, and sealing all papers in this matter, was not published, but is included as Appendix G. On July 25, 1997, the court of appeals amended the July 9, 1996 sealing order to allow respondents' brief to be available publicly; that order is included as Appendix F.

The August 20, 1997 order and opinion of the court of appeals, reversing the district court in part and affirming in part, is reported at 119 F.3d 1077 (3d Cir. 1997) and included as Appendix B. On September 11, 1997, the court of appeals again amended the sealing order, to allow the petition for rehearing and any subsequent order thereon to be available publicly; that order is reproduced here as Appendix E. On September 17, 1997, the court of appeals entered an order denying the petition for rehearing and rehearing in banc, which is included as Appendix D. On the same date, the court of appeals entered an order extending the court's July 9, 1996 injunction until either 90 days following the denial of appellants' rehearing petition or the date of disposition by this Court of a motion for an injunction pendente lite, in the event such a motion is made; that order is reproduced here as Appendix C. An amended judgment, correcting a clerical error, was issued on October 3, 1997 and is reproduced here as Appendix A.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit entered judgment on August 20, 1997 and denied petitioners' petition for

rehearing on September 17, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Ex Post Facto Clause of the United States Constitution applicable to the States provides: "No State shall . . . pass any . . . ex post facto law." U.S. Const. art. I § 10.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V

New Jersey's Registration and Community Notification Laws, Pub. L. 1994, Chs. 128, 133 (codified at N.J. Stat. Ann. 2C:7-1 to 7-11), collectively known as "Megan's Law," are reproduced at Appendix J.

STATEMENT OF THE CASE

This case involves a challenge to the constitutionality of the community notification requirements of New Jersey's Megan's Law. The challenge is brought by the class of persons (hereinafter "petitioners") required to register as sex offenders pursuant to Megan's Law, who will be subject to the community notification provisions of the Law, and whose offenses were committed prior to October 31, 1994, the effective date of the Law. *E.B. v. Verniero*, 119 F.3d 1077, 1087 (3d Cir. 1997), Appendix ("App.") B at 22a.[1] Petitioners contended below that the notification provisions of Megan's Law violate the Ex Post Facto, Double Jeopardy, and Due Process Clauses of the United States Constitution. *Ibid.* Petitioners succeeded in their due process challenge and accordingly do not seek this Court's review of that claim. Petitioners' remaining claims, based on the Ex Post Facto and Double Jeopardy Clauses, revolve around a single question: do the community notification provisions of Megan's Law impose punishment?

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1. All subsequent citations to the court of appeals' decision in this case will be solely to the page numbers of the appendix to this petition.

A. Megan's Law

Megan's Law was enacted in rapid response to the public outcry following the horrible rape and murder, by a twice-convicted sex offender, of seven-year old Megan Kanka, whose name became attached to the legislative response. In mid-August 1994, two weeks after Megan's murder, bills providing for registration and community notification were introduced in the New Jersey Assembly. *E.B.*, App. B at 7a. The legislation was then "rushed to the floor as an emergency measure, skipping the committee process, and was debated only on the floor; no member voted against it." *Artway v. Attorney General of New Jersey*, 81 F.3d 1235, 1243 (3d Cir. 1996). The resulting Law was enacted by the end of October 1994, imposing extraordinary sanctions upon sex offenders. As the Supreme Court of New Jersey recognized in *Doe v. Poritz*, 142 N.J. 1, 662 A.2d 367, 422 (1995), Megan's Law "sail[s] on truly uncharted waters, for no other state has adopted such a far-reaching statute." *See also id.* at 428 (Stein, J., dissenting) ("none of the states with retroactive notice provisions provides for notification as extensive as that mandated by New Jersey's statutes"); *Artway*, 81 F.3d at 1251, n.11 (same).

Under the provisions of the statute, all offenders must register with local authorities and provide extremely detailed private information to local law enforcement. The notification provisions of Megan's Law are triggered following completion of the registration process. *Id.* at 1243. After registration, the prosecutor determines a registrant's tier level by following the process described in guidelines established by the Attorney General. *See* Pa737-756.[2] The prosecutor of the county in which the registrant resides must evaluate the information provided through registration and, in consultation with the prosecutor of the convicting county, determine whether the registrant poses a low, moderate, or high risk of re-offense. N.J. Stat. Ann. 2C:7-8d(1).

To make this determination of a registrant's future risk, the prosecutor must use the "Registrant Risk Assessment Scale"

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2. "Pa" refers to petitioners' appendix filed with the court of appeals.

(RRAS) promulgated by the Attorney General. Pa613-623. The scale is divided into thirteen categories, organized into four headings: (1) Seriousness of Offense; (2) Offense History; (3) Characteristics of the Offender; and (4) Community Support. *Id.* The prosecutor provides a score for each of the categories. *Id.* The initial scale scores are multiplied by factors which differ by heading, and the data is tabulated for a final risk assessment score. Depending on their scores, registrants are classified as Tier 1 (low risk), Tier 2 (moderate risk), or Tier 3 (high risk). *Id.* A registrant's final score is based "overwhelmingly" on past conduct, as 90 of the possible 111 points in the RRAS are derived from the person's past criminal offense and social history. *See Artway*, 81 F.3d at 1266, n.30.

In addition to determining the registrant's tier level, the prosecutor decides the appropriate scope of community notification for each Tier 2 and 3 registrant. *See* Pa737-756. For all Tier 2 offenders, the prosecutor must notify, in addition to local law enforcement agencies, those

> community organizations, agencies and groups which have registered with the Prosecutor's Office, and all local educational institutions, licensed daycare centers and summer camps that are likely to encounter the offender.

Pa745-46. For all Tier 3 offenders, the prosecutor must notify, "in addition to community organizations and law enforcement agencies, all members of the public likely to encounter the person registered." Pa746. Recipients of notification for Tier 2 and Tier 3 registrants receive the offender's name, description and a recent photograph, along with a description of the offense for which the registrant was convicted, his address, place of employment and/or schooling, and vehicle license plate number. Pa748; *see also* Pa625-627 (samples of notifications). As the court of appeals recognized, community notification under Tier 2 or 3 also "features the State's determination . . . that the prior offender is a future danger to the community." *Artway*, 81 F.3d at 1266.

Once the prosecutor has determined the level and scope of notification, he is required to provide the registrant with notice of the determination. *See Doe*, 662 A.2d at 382. The same notice also informs the registrant that a pre-trial conference will be scheduled within 14 days of service. *Id.* at 382-385. At the conference, the judge is authorized either to render a final decision, or to require a further hearing ten to fourteen days after the conference. Pa548-49. At any such hearings regarding classification and notification, the State, as a result of the decision in this case, bears the burden of proof. *See E.B.*, App. B at 80a. No rules of evidence apply at these hearings, and the prosecutor can introduce evidence of past alleged offenses that were never the subject of a conviction, including allegations that were dismissed as the result of a plea agreement. *See In re Registrant C.A.*, 146 N.J. 71, 679 A.2d 1153, 1162-66 (1996). The registrant must seek the court's permission in order to subpoena witnesses, cross-examine witnesses, or call experts to testify. *Doe*, 662 A.2d at 382-83.

Despite the relatively small number of cases in which official community notification has occurred thus far (according to the Attorney General there were 99 completed community notifications at the time of the appeal, Pa645), petitioners developed a compelling accumulation of information demonstrating that both formal and informal notification to the community of one's designation as a sex offender has resulted in significant injury. Pa172-389. As the court of appeals recognized, "[t]here can be no doubt that the indirect effects of Tier 2 and Tier 3 notification on the registrants involved and their families are harsh." *E.B.*, App. B at 58a. The court continued:

> The record documents that registrants and their families have experienced profound humiliation and isolation as a result of the reaction of those notified. Employment and employment opportunities have been jeopardized or lost. Housing and housing opportunities have suffered a similar fate. Family and other personal relationships have been destroyed or severely strained. Retribution has been visited by private, unlawful violence and threats and, while such incidents of "vigilante justice" are not

> common, they happen with sufficient frequency and publicity that registrants justifiably live in fear of them. It also must be noted that these indirect effects are not short lived. While there are suggestions in the record that the circumstances of a registrant may stabilize as time passes after notification, the statute permits repeat notification over a period of many years.

Id. at 58a-59a; accord *id.* at 111a-112a (Becker, J., dissenting).

B. Procedural History

Petitioners and the class they represent are convicted sex offenders whose offenses were committed prior to enactment of Megan's Law. All class representatives have been classified by prosecutors as either Tier 2 or Tier 3 offenders pursuant to Megan's Law. Pa395-545. Petitioners alleged in their class action complaint that community notification imposes punishment, and that the retroactive application of the community notification provisions of Megan's Law to the class therefore violates the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution. Petitioners further maintained that the tier classification and notification proceedings under Megan's Law violate the procedural due process protections of the Fourteenth Amendment. Petitioners sought a preliminary injunction, declaratory relief, and a permanent injunction preventing respondents — the Attorney General and the County Prosecutors — from issuing or disseminating Tier 2 or Tier 3 community notification.

Shortly after the filing of the second amended complaint, the district court certified the following class:

> All persons required to register as sex offenders pursuant to N.J.S.A. 2C:7-1 *et seq.* and whose offenses were committed prior to October 31, 1994, the effective date of the New Jersey registration and community notifications laws, and who have been or will be classified as Tier 2 or Tier 3 offenders.

See W.P. v. Poritz, 931 F. Supp. 1187 (D. N.J. 1996), App. I at 206a. The same order included a preliminary injunction preventing

respondents from issuing Tier 2 or Tier 3 community notification with respect to any class member. *Ibid.* The injunction was to expire ten days after the court of appeals' decision in *Artway v. Attorney General of New Jersey, supra*, which was expected to resolve the constitutional claims raised by petitioners. *Id.* at 207a.

On April 12, 1996, the court of appeals filed its opinion in *Artway*. The court upheld the constitutionality of the registration and Tier 1 notification provisions of Megan's Law. 81 F.3d at 1267. It did not reach, however, the constitutionality of Tier 2 or Tier 3 community notification, holding that Artway's challenges to those provisions were not ripe. *Id.* at 1251. The court nonetheless acknowledged, several times, that "Artway's contention that notification constitutes punishment is prima facie quite persuasive," *id.* at 1242; *see also id.* at 1265-66, and the court also established an analytical framework designed to assess whether community notification imposes punishment. *Id.* at 1254-64. Under this framework, a "measure must pass a three-prong analysis — (1) actual purpose, (2) objective purpose, and (3) effect — to constitute non-punishment." *Id.* at 1263. In conjunction with ruling that Artway's challenge to community notification was not ripe, the court of appeals directed district courts to collect evidence documenting the impact that community notification would have on registrants. *Id.* at 1250 n.9.

1. District Court's Opinion

Subsequent to the *Artway* decision, the district court extended its preliminary injunction until June 17, 1996, and invited the parties to file summary judgment motions. On the date scheduled for argument on the motions, this Court filed its opinion in *United States v. Ursery*, 116 S. Ct. 2135 (1996), which held that in rem civil forfeitures under 21 U.S.C. § 881 do not impose punishment for purposes of the Double Jeopardy Clause. At the end of the summary judgment hearing, the district court directed the parties to submit supplemental briefs within two days, addressing the effect, if any, of *Ursery* upon the present case. Several days later, on July 1, 1996, the district court filed its decision in this case, concluding that, in light of *Ursery*, this Court's decision in *Artway* was no

longer "binding precedent for the issues and claims presented." *W.P.*, App. H at 147a.

Based on its interpretation of *Ursery*, the district court devised a "new" test to determine whether community notification imposes punishment. That test examined the following factors:

> The express intent of the legislature as reflected in the legislation itself and the legislative history; the "purpose" of that legislation, viewed objectively, particularly if that demonstrates potential for a more punitive objective; a balancing of remedial and punitive goals; an analysis of how such laws have been considered historically, if there is any clear historical analogue; and a review of the "effect" of such legislation if that effect is extreme or severe.

Id. at 149a. As the district court acknowledged, "each of those considerations was recognized in *Artway*." *Ibid.* Rather than applying those considerations as discrete tests, however, the district court believed that *Ursery* required the various factors to be weighed "in a less structured fashion." *Id.* The district court also held that, in assessing the effects of community notification, the illegal vigilante actions of community members could not be considered. *Id.* at 25-26. After weighing all the factors, the district court concluded that community notification does not impose punishment and therefore could be applied retroactively to petitioners. *Id.* at 29-44. The district court also concluded that the community notification proceedings did not violate the due process guarantees of the United States Constitution. *Id.* at 44-56. The court accordingly granted respondents' motion for summary judgment.

2. Court of Appeals' Opinion

On July 2, 1996, petitioners filed their notice of appeal. Pa1. On July 5, 1996, they filed a motion in the court of appeals seeking a stay of the district court's order and an injunction against notification during the pendency of the appeal. The court granted petitioners' motion on July 8, 1996.

The court of appeals heard oral argument on October 21, 1996.

In addition to the parties, the court heard argument from two *amici curiae*: (1) the United States, in support of respondents, and (2) the American Civil Liberties Union of New Jersey ("ACLU-NJ"), in support of petitioners. The argument, like the briefs in the case, focused extensively on whether the *Artway* punishment test remained the applicable law in light of *Ursery*. Petitioners and *amicus* ACLU-NJ contended that *Ursery* was largely inapposite and did not deprive *Artway* of its binding authority as precedent; the Attorney General and the United States each argued to the contrary, contending that *Ursery* required application of a new punishment test and offering separate tests for punishment, which differed from each other's and from the one devised by the district court.

After oral argument but before the court of appeals filed its decision, this Court filed its opinion in *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997). At the invitation of the court of appeals, the parties and *amici* submitted briefs regarding the impact of *Hendricks* upon the *Artway* test. Petitioners and their supporting *amicus* contended that *Hendricks* did not justify abandoning the *Artway* test. Respondents argued that *Hendricks* and *Ursery*, taken together, required application of a punishment test different from the one established in *Artway*.

The court of appeals filed its opinion on August 20, 1997. The court held that community notification does not impose punishment and that its retroactive application thus does not violate the Ex Post Facto or Double Jeopardy Clause. *E.B.*, App. B at 7a. The court also held, however, that the procedures used to determine a registrant's classification and scope of notification violated due process, and required that the State bear the burden of proof, by clear and convincing evidence, to justify both the tier classification and planned scope of notification. *Ibid.* In holding that community notification does not impose punishment, the court of appeals applied the test established in *Artway*, rejecting respondents' contention that *Usery* and *Hendricks* required the abandonment of the *Artway* test. *Id.* at 38a.

Although it purported to apply the *Artway* punishment test,

the court of appeals, based on its reading of *Hendricks*, altered the degree of deference accorded to the legislature's classification of Megan's Law as remedial and nonpunitive. Specifically, the court concluded that *Hendricks* requires "the clearest proof" that a statute is "so punitive either in purpose or effect" before a court can reject the legislature's designation of a measure as civil and remedial. *Id.* at 43a. The court of appeals acknowledged that this Court had previously required such a high degree of deference only in cases determining whether a proceeding is sufficiently criminal to warrant the procedural protections of the Fifth and Sixth Amendments, and not in cases where the only issue was whether the measure itself — regardless of the nature of the proceeding used to impose the measure — constituted punishment for purposes of double jeopardy or ex post facto analysis. *Id.* The court speculated, however, that after *Hendricks* "it seems clear that similar deference to the legislative judgment is required whenever legislative measures are challenged on the basis of the Ex Post Facto and Double Jeopardy Clauses." *Id.*

The court proceeded to apply the *Artway* factors, concluding first that the legislature's "actual" purpose was remedial, despite the unusual procedures by which the law was enacted. *Id.* The court next applied the "objective" purpose prong of the *Artway* test, which itself has three sub-prongs, only two of which were relevant in this case: (1) whether there is a reasonable fit between the means and ends of community notification; and (2) whether measures analogous to community notification have traditionally been regarded as punishment. *Id.* at 47a-56a. The court held that there was a reasonable "fit" between the goals and means of community notification. *Id.* at 51a. The court then rejected petitioners' argument that community notification is analogous to such historical punishments as public shaming, branding, humiliation, and banishment, concluding instead that community notification is more like wanted posters and quarantine notices than it is like traditional shaming punishments. *Id.* at 51a-56a. Finally, the court applied a significantly diluted version of the "effects" prong of the *Artway* inquiry, holding that the direct and various indirect effects of community notification — when considered separately — were

insufficiently harsh, in light of the state's interest in notification, to conclude that community notification is punitive. *Id.* at 56a-65a.

3. Judge Becker's Dissent

Judge Becker, the author of the court of appeals' decision in *Artway*, dissented from the court's ex post facto and double jeopardy ruling. *Id.* at 81a (Becker, J., dissenting). Judge Becker concluded that community notification failed the history prong of the *Artway* punishment test, because community notification is most closely analogous to "the shaming punishments of colonial America, which were indubitably and unabashedly punitive." *Id.* at 83a. Judge Becker criticized the majority for ignoring the obvious and relevant parallels between community notification and such punishments, and for focusing instead on "warning or wanted posters and quarantine notices," which disseminate "very different information from that provided by the community notification provisions of Megan's Law" and do not constitute "a *judicially endorsed* pronouncement that the registrant poses a danger to the community." *Id.* at 94a-96a. Judge Becker also criticized the majority's approach to the effects test, observing that the court had narrowed the test from *Artway* both procedurally and substantively, and stating specifically that the court's "novel holding that nothing short of the deprivation of a sufficiently fundamental interest can give rise to an effect that would constitute punishment is, I believe, incorrect." *Id.* at 83a.

4. Denial Of Rehearing And Extension Of Injunction Against Community Notification

After the court of appeals issued its decision, petitioners sought rehearing and rehearing in banc, and respondents moved to lift the injunction against community notification that had been imposed earlier in the case. The court of appeals denied petitioner's motion for rehearing and rehearing in banc. App. D. The court also rejected respondents' motion, and issued an order providing that the injunction is to remain in effect until this Court has an opportunity to consider petitioner's motion for pendente lite relief, if any, and this petition for certiorari. App. C.

REASONS FOR GRANTING THE WRIT

There are four strong reasons to grant the writ in this case. First, this is a case of extreme practical importance, as it has the potential to affect significantly the lives of literally thousands of individuals. *See infra* Part I(A). Second, this is a case of exceptional doctrinal importance, as it provides the Court with an excellent opportunity to clarify its "punishment" jurisprudence, which is currently in a state of apparent conflict and some disarray. *See infra* Part I(B). Third, this case presents a question — whether community notification laws are punitive — that has caused a split of authority between several courts of appeals, on the one hand, and a state court of last resort, on the other. *See infra* Part II. Fourth, and finally, this case is an excellent vehicle to address the questions presented, as the issues have already been addressed by numerous other state and federal courts (and thus there is no need to await further percolation) and the majority and dissenting opinions in the decision below are thorough and well-researched. *See infra* Part III. Considered together, these four reasons provide a compelling justification for granting certiorari.

I. Whether Community Notification Regarding Sex Offenders Constitutes Punishment Is A Question Of Exceptional Importance, Both Practically And Doctrinally, Which Should Be Answered By This Court.

A. The Practical Importance

The impact of community notification laws runs both wide and deep. Megan's Law originated in New Jersey in late 1994, and various replications of New Jersey's Megan's Law were subsequently adopted by numerous States. Indeed, all fifty states have now enacted sex offender registration statutes.[3] Thirty-seven

3. *See* Ala. Code § 13A-11-200, *et seq.* (1994); Alaska Stat. §§ 12.63.010, *et seq.* (Michie 1995), 18.65.087 (Michie 1994); Ariz. Rev. Stat. Ann. § 13-3821, *et seq.* (West 1996); Ark. Code Ann. § 12-12-901, *et seq.* (Michie 1995); Cal. Penal Code § 290, *et seq.* (West Supp. 1996); Colo. Rev. Stat. Ann. § 18-3-412.5 (West Supp. 1996); Conn. Gen. Stat. Ann. § 54-102r (1996); Del. Code Ann. tit. 11 § 4120 (1995); Fla. Stat. (Cont'd)

of these States, including New Jersey, also provide for community notification regarding the presence of registered sex offenders, either through affirmative notice of some kind (twenty-four States), or by granting public access to the information upon request. *See* Brief for the United States As Amicus Curiae Supporting Defendants-Appellants 2, 6a-16a (citing in text and reproducing in appendix *Summary of Community Notification Statutes by State*, National Center for Missing and Exploited Children (July 1996)) (on file with the court of appeals). Of these thirty-seven state statutes that

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Ann. §§ 944.606, 775.21, *et seq.* (West Supp. 1997); Ga. Code Ann. § 42-9-44.1 (Michie 1994); Haw. Rev. Stat. § 707-743 (Michie Supp. 1996); Idaho Code § 18-8301, *et seq.* (Michie 1996); 730 Ill. Comp. Stat. 150/1, *et seq.* (West Supp. 1996); Ind. Code Ann. § 5-2-12-1, *et seq.* (West Supp. 1996); Iowa Code § 692A (1995); Kan. Stat. Ann. § 22-4901, *et seq.* (1994); Ky. Rev. Stat. Ann. § 17.500, *et seq.* (Michie Supp. 1996); La. Rev. Stat. Ann. § 15:540, *et seq.* (West Supp. 1996); Me. Rev. Stat. Ann. tit. 34-A § 11101, *et seq.* (West Supp. 1996); Md. Ann. Code art. 27, § 792 (1996); Mass. Gen. Laws Ann. ch. 6, § 178, *et seq.* (West Supp. 1996); Mich. Stat. Ann. § 4.475(1), *et seq.* (Law. Co. op. Supp. 1996); Minn. Stat. Ann. § 243.166 (West 1977); Miss. Code Ann. § 45-33-1, *et seq.* (Law. Co. op. Supp. 1977); Mo. Rev. Stat. § 566.600, *et seq.* (1996); Mont. Code Ann. § 46-23-501, *et seq.* (1994); Neb. Rev. Stat. § 29-4001, *et seq.* (R.S. Supp. 1996), eff. January 1, 1997; Nev. Rev. Stat. § 207.151, *et seq.* (Michie Supp. 1995); N.H. Rev. Stat. Ann. § 632-A:11, *et seq.* (1996); N.J. Stat. Ann. § 2C:7-2 (West Supp. 1996); N.M. Stat. Ann. § 29-11A-1, *et seq.* (Michie Supp. 1996); N.Y. Correct. Law § 168 (1996); N.C. Gen. Stat. § 14-208.5, *et seq.* (Michie 1996); N.D. Cent. Code § 12.1-32-15, *et seq.* (Butterworth Supp. 1995); Ohio Rev. Code Ann. § 2950.01 (Baldwin 1995); Okla. Stat. Ann. tit. 57 § 581, *et seq.* (West Supp. 1997); Or. Rev. Stat. § 181.585 (Michie Supp. 1996); Pa. Stat. Ann. tit. 42 § 9793 (West Supp. 1996); R.I. Gen. Laws § 11.37.1-1, *et seq.* (Michie Supp. 1996); S.C. Code Ann. § 23-3-400, *et seq.* (1994); S.D. Codified Laws Ann. § 22-22-30, *et seq.* (Michie Supp. 1996); Tenn. Code Ann. § 40-101, *et seq.* (Michie Supp. 1996); Tex. Rev. Civ. Stat. Ann. art. 6252-13c.1 (West Supp. 1997); Utah Code Ann. § 77-27-21.5 (Michie Supp. 1996); Va. Code Ann. § 19.2-390.1 (Michie Supp. 1996); Wash. Rev. Code Ann. §§ 9A.44.130, 4.24.550 (West Supp. 1997); W. Va. Code § 61-8F-1, *et seq.* (Michie Supp. 1996); Wis. Stat. Ann. § 175.45 (West Supp. 1995); Wyo. Stat. § 7-19-101, *et seq.* (1995).

provide for community notification, finally, fifteen explicitly indicate that they are to be applied retroactively and twenty are silent on the question; only two explicitly prohibit retroactive application. *See id.* at 6a-16a

The proliferation of community notification statutes will undoubtedly continue, as the United States recently enacted a federal version of Megan's Law. Pub. L. No. 104-145, 110 Stat. 1345 (May 17, 1996), codified at 42 U.S.C. § 14071(d)(2). The federal Megan's Law is an amendment to the 1994 Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, which provides funding incentives for states to adopt laws requiring convicted sex offenders to register with law enforcement agencies upon their release. *See* 42 U.S.C. § 14071. The Megan's Law amendment mandates that States, in order to satisfy the funding requirements of the Jacob Wetterling Act, adopt laws that require the disclosure of "relevant information [regarding registered sex offenders] that is necessary to protect the public." 42 U.S.C. § 14071(d)(2). Whether community notification can be imposed retroactively, therefore, is a question whose answer will affect the lives of tens of thousands of individuals — indeed, in this case alone, the decision will apply to approximately two-thousand class members. *See W.P.*, App. I at 192a.

The effect of community notification upon an individual, in turn, is undeniably significant and pervasive. As the court of appeals recognized in this case, the consequences of community notification are potentially catastrophic to registrants:

> Notification puts the registrant's livelihood, domestic tranquillity, and personal relationships with all around him in grave jeopardy. This jeopardy will not only extend to virtually every aspect of the registrant's life, it will also last at least 15 years.

E.B., App. B at 71a; *see also id.* at 61a (describing the "harsh" effects of notification in detail). In dissent, Judge Becker agreed, observing that

> the burden imposed [by community notification] is borne by the offender in all aspects of his life. At worst, the

> offender is literally cut off from any interaction with the wider community. He is unable to find work or a home, cannot socialize, and is subject to violence or at least the constant threat of violence. At best, he must labor within significant confinements. Although perhaps some people will hire him or rent him a home, his social intercourse with others is all but non-existent. The effects of notification permeate his entire existence.

Id. at 111a-112a. As Judge Becker further pointed out, "[t]hroughout the nation, there are continual reports of harassment, threats, isolation, and violence" as a result of community notification. *Ibid.*; *see also id.* at 112a-113a n.14 (Becker, J., dissenting) (describing some of the recent occurrences).

The constitutionality of community notification is also of paramount concern to New Jersey and the numerous other States that have enacted notification laws. In fact, the court of appeals characterized New Jersey's interest in the effective implementation of Megan's Law as "compelling" — i.e., an interest of the highest magnitude in constitutional analysis. *Id.* at 72a ("The state . . . has a compelling interest in protecting its citizens by giving prompt notification to potential victims and relevant caregivers with respect to registrants who are accurately determined to be Tier 2 or Tier 3 risks."). The case, finally, is "of enormous importance to children like Megan Kanka, after whom the law was named, and to their parents." *Artway*, 83 F.3d at 595 (Alito, J., dissenting from denial of rehearing in banc).

The extensive and growing use of community notification statutes, the weight of the competing interests involved, and the potentially devastating effects of community notification combine to lend this case a great measure of practical importance. At the same time, the individual rights involved are among the most basic and fundamental of those protected by the Constitution. This Court observed just last Term in *Lynce v. Mathis*, 117 S. Ct. 891, 895 (1997), that the Ex Post Facto Clause, and the presumption against the retroactive application of new laws that it embodies, is one of the "essential thread[s] in the mantle of protection that the law

affords the individual citizen." Similarly, the protection afforded by the Double Jeopardy Clause against multiple punishments "has deep roots in our history and jurisprudence." *Halper*, 490 U.S. at 440; *see also Poritz*, 662 A.2d at 338 (describing the Double Jeopardy and Ex Post Facto Clauses as "towering constitutional provisions of great importance to individual dignity, freedom, and liberty").

Given all that is at stake, it is crucial that the relevant States and affected individuals have clear guidance as to the constitutionality of imposing community notification retroactively. As the next section describes in greater detail, that guidance is difficult to discern from the present case law. Indeed, in establishing its punishment test in *Artway*, the court of appeals described its task as an attempt to "divine" a test from case law that it explicitly termed "confused." *Artway*, 81 F.3d at 1254. After describing the test it established, the court of appeals recognized that its attempt "to harmonize a body of doctrine that has caused much disagreement in the federal and state courts . . . is by no means perfect," and added that "[o]nly the Supreme Court knows where all the pieces belong." *Id.* at 1263. The court of appeals expressed its "hope," finally, that this Court would "provide more guidance" than it has regarding the question of when a measure constitutes punishment. *Id.* The Court now has such an opportunity, and petitioners respectfully urge this Court to seize it.

B. The Doctrinal Importance

The key doctrinal question presented by this case is simple enough to state: what is the proper test to determine if a measure such as community notification imposes punishment for purposes of the Ex Post Facto and Double Jeopardy Clauses of the Constitution? The answer to this question is much more difficult, if not impossible, to state with confidence, as this Court's "punishment" jurisprudence is, in a word, mysterious. Proof of this point is found most readily in the fact that State and federal courts addressing precisely the question presented by this case have employed quite varied "punishment" tests and are in conflict as to which factors should be considered in determining whether

community notification constitutes punishment. *Compare, e.g., State v. Costello*, 138 N.H. 587, 643 A.2d 531, 533 (N.H. 1994) ("evident purpose" of the legislature is dispositive); *People v. Adams*, 144 Ill. 2d 381, 581 N.E. 2d 637, 641 (Ill. 1991) (same) with *Doe v. Pataki*, 120 F.3d 1263, 1275-76 (2d Cir. 1997) (applying factors from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) to determine whether community notification is sufficiently punitive in form or effect to overcome presumption that statute is remedial); *Russell v. Gregoire*, 124 F.3d 1079, 1087 (9th Cir. 1997) (same) and *Artway*, 81 F.3d at 1261-63 (explicitly rejecting application of *Mendoza-Martinez* factors and creating three-prong punishment test based on synthesis of this Court's ex post facto and double jeopardy decisions); *Poritz*, 662 A.2d at 399-405 (rejecting relevance of *Mendoza-Martinez* factors and deriving new test based on synthesis of this Court's decisions).

The jurisprudential mystery that has produced such divergent approaches to the same constitutional question arises from the apparent conflict between this Court's decisions in *Halper* and *Austin*, on the one hand, and *Ursery* and *Hendricks* on the other. Specifically, these decisions leave unsettled whether it is the nature of the proceeding or the nature of the measure that matters in ex post facto and double jeopardy analysis, and what level of deference must be accorded to a legislative designation of a measure (or proceeding) as civil. Prior to *Ursery* and *Hendricks*, this Court indicated that, to determine whether a measure constitutes punishment for purposes of double jeopardy analysis, "it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated." *Halper*, 490 U.S. at 447.[4] *Cf. Austin v. United States*, 509 U.S. 602, 610 (1993) (observing, in an Eighth

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4. This statement appears to be equally applicable with regard to determining punishment for purposes of the Ex Post Facto Clause, as this Court has used double jeopardy precedents in ex post facto cases and has never suggested that there is a different way to determine punishment for one Clause as opposed to the other. *See, e.g., Hendricks*, 117 S. Ct. at 2086; *See also E.B.*, App. B at 35a.

Amendment case, that "the question is not . . . whether forfeiture . . . is civil or criminal, but rather whether it is punishment"). This Court recognized that punishment, for purposes of double jeopardy, "indeed may arise from either criminal or civil proceedings," *id.* at 443, and held that "a civil as well as criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment," *id.* at 448. *Cf. Austin*, 509 U.S. at 610. *See generally Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 805-808 (1994) (Scalia, J., dissenting) (explaining focus and operation of *Halper*).

Thus, according to *Halper* and *Austin*, determining the nature of the proceeding — *i.e.*, whether the proceeding is criminal or civil — is unnecessary and irrelevant in assessing whether a measure constitutes punishment for double jeopardy, Eighth Amendment, and presumably ex post facto purposes. As this Court further explained in *Halper*:

> while recourse to statutory language, structure, and intent is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter, the approach is not well suited to the context of the humane interests safeguarded by the Double Jeopardy Clause's proscription of multiple punishments.

490 U.S. at 447 (internal quotation omitted). This Court in *Halper*, finally, disavowed reliance on cases such as *Mendoza-Martinez*, *supra*, and *United States v. Ward*, 448 U.S. 242, 248-51 (1980), on the ground that the factors used to determine punishment in those cases were appropriate only for determining when the criminal procedural protections of the Fifth and Sixth Amendments must be afforded. *Halper*, 490 U.S. at 447; *accord Austin*, 509 U.S. at 610, n.6.

In *Ursery*, however, and later in *Hendricks*, this Court — without explanation — turned its focus to the nature of the proceedings in order to determine whether the measures at issue constituted punishment for purposes of the Double Jeopardy and Ex Post Facto Clauses. In *Ursery*, a double jeopardy case involving civil forfeiture, the Court thus framed its two-part inquiry as follows: "First, we ask whether Congress intended [forfeiture] *proceedings* under 21 U.S.C.

§ 881 and 18 U.S.C. § 981 to be criminal or civil." 116 S. Ct. at 2147 (emphasis added). If Congress intended the proceedings to be civil, the Court then would "turn to consider whether the *proceedings* are so punitive in fact as to persuade us that forfeiture *proceeding*[*s*] may not be legitimately viewed as *civil in nature*, despited Congress' intent." *Ibid.* (internal quotation omitted) (emphasis added). To answer this second question, finally, the Court explicitly relied on the *Ward* and *Mendoza-Martinez* factors. *Id.* at 2148-49; *cf. Kurth Ranch*, 511 U.S. at 802 (Scalia, J., dissenting) (describing as "incoherent" the notion that the nature of the proceeding determines whether a measure is punishment for double jeopardy purposes, and stating that "if the Constitution prohibits multiple punishments, the nature of the proceeding in which punishment is imposed should make no difference").

The conflict between *Halper* and *Ursery* is obvious: *Halper* holds that it is the nature of the penalty involved that is dispositive in determining whether the penalty constitutes punishment, and that the nature of the proceeding is irrelevant; accordingly, *Halper* explicitly disavows reliance on the *Ward* and *Mendoza-Martinez* factors. *Ursery*, on the other hand, focuses on the nature of the proceeding, and relies explicitly on the *Ward* and *Mendoza-Martinez* factors to determine whether the *proceedings* must be deemed criminal. This significant conflict is not acknowledged in *Ursery*, despite the fact that the different approaches, and their ability to lead to different results, was discussed at length by Justice Scalia in his dissenting opinion in *Kurth Ranch*. *See Kurth Ranch*, 511 U.S. 767, 805-808 (Scalia, J., dissenting). To be sure, the Court stated in *Ursery* that "the case-by-case balancing test set forth in *Halper*, in which a court must compare the harm suffered by the Government against the size of the penalty, is inapplicable to civil forfeiture." 116 S. Ct. at 2145. But the Court did not reject, or even discuss, the teaching of *Halper* that whether a proceeding is civil or criminal is irrelevant when determining if a sanction imposes punishment for double jeopardy purposes.[5]

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5. Similarly, although the Court in *Ursery*, 116 S. Ct. at 2146, rejected the substantive punishment tested used in *Austin*, it did not reject

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This Court did not resolve the inconsistency between *Ursery* and *Halper* in its latest "punishment" case, *Hendricks, supra*, where it faced the question whether the civil commitment of sexually violent predators imposes punishment for purposes of the Ex Post Facto or Double Jeopardy Clauses. The Court did not confront the conflict between *Halper* and *Ursery* because of the way the case was presented: Hendricks did not argue that civil commitment is punishment, regardless of the nature of the proceedings used to commit offenders. Rather, "[t]he thrust of Hendricks' argument [was] that the Act establishes *criminal proceedings*; hence confinement under it necessarily constitutes punishment." 117 S. Ct. at 2082 (emphasis added). While it is true that punishment follows criminal proceedings, *Halper* establishes that it is also true that punishment can be imposed in civil proceedings, and that "recourse to statutory language, structure, and intent," while "appropriate in identifying the inherent nature of a proceeding, . . . is not well suited to the context of the humane interests safeguarded by the Double Jeopardy Clause's proscription of multiple punishments." 490 U.S. at 447 (internal quotation omitted).

Nevertheless, because Hendricks apparently only argued that the civil commitment proceedings were actually criminal proceedings, this Court framed its inquiry as "first of all a question of statutory construction." 117 S. Ct. 2081. It then utilized the two-part inquiry used in *Ursery*, asking whether the legislature intended to establish "civil" proceedings, and, if so, whether the "party challenging the statute provide[d] 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.' " *Id.* at 2082 (quoting *Ward*, 448 U.S. at 248-49). In answering the second question, the Court again, as it had in *Ursery*, relied on the *Ward* and *Mendoza-Martinez* factors. *See ibid.*

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or discuss *Austin*'s reaffirmation of the principle established in *Halper*, that it is the nature of the sanction rather than the nature of the proceeding that must be examined in determining whether the sanction imposes punishment. *See Austin*, 509 U.S. at 610 n.6.

Neither *Ursery* nor *Hendricks* purported to establish universal tests for determining whether a measure is punishment. To the contrary, *Ursery* repeatedly and explicitly relied on the Court's "traditional understanding that [in rem] civil forfeiture does not constitute punishment for purpose of the Double Jeopardy Clause." 116 S. Ct. at 2147; *see also E.B.*, 119 F.3d at 1094 ("the holding of *Ursery* is a narrow one limited to civil forfeitures."). At the same time, the Court in *Ursery* went to great lengths to limit the punishment tests utilized in prior decisions to the specific circumstances or sanctions involved in those cases, suggesting that the appropriate punishment test depends upon the measure or circumstances involved in each case. *See id.* at 2143-47 (discussing *Halper, supra*; *Austin, supra*; *Kurth Ranch, supra*); *see also Gregoire*, 124 F.3d at 1084, n.5 (discussing *Ursery*'s limitation of prior precedent). Like *Ursery, Hendricks* also relied on a specific tradition regarding civil commitment as non-punitive, emphasizing that the commitment "of the dangerously mentally ill. . . . is a legitimate non-punitive governmental objective and has been historically so regarded." 117 S. Ct. at 2082; *see also E.B.*, App. B at 40a ("Like *Ursery, Hendricks* does not establish a single formula for identifying which legislative measures constitute punishment and which do not." (internal quotation omitted)).

This Court's limitation of the precedential value of prior "punishment" cases in *Ursery*, along with the Court's silence in both *Ursery* and *Hendricks* regarding the general applicability of the punishment tests used in those cases, has created a great deal of confusion among lower federal and state courts. It is entirely unclear, in short, whether this Court has one or several punishment tests that should be used and, if the latter, the circumstances under which any particular test should be applied. *See, e.g., Gregoire*, 124 F.3d at 1083-85 (rejecting punishment test established in *Artway* because it relied on *Halper, Austin*, and *Kurth Ranch*, and applying "intents-effects" test of *Ursery* and *Hendricks*); *United States v. Hatfield*, 108 F.3d 67, 70 (4th Cir. 1997) (rejecting application of *Halper* to a debarment proceeding, and applying *Ursery* test); *United States v. Hudson*, 92 F.3d 1026, 1029 (10th Cir. 1996) (applying *Halper* test because of sanction involved), *cert. granted*,

117 S. Ct. 1425 (Apr. 14, 1987).[6] The court of appeals in this case, for example, adhered to its view, first expressed in *Artway*, that "*Mendoza-Martinez* is inapplicable outside the context of determining whether a proceeding is sufficiently criminal in nature to warrant criminal procedural protections of the Fifth and Sixth Amendments." *Artway*, 81 F.3d at 1262.[7] *Accord S.A. Healy Co. v. Occupational Safety & Health Comm'n*, 96 F.3d 906 (7th Cir. 1996), *pet. for cert. filed*, 65 U.S.L.W. 3587 (Feb. 13, 1997); *Poritz*, 662 A.2d at 399-405. The Kansas Supreme Court, on the other hand, as well as the United States Courts of Appeals for the Second and Ninth Circuits, have concluded that "*Ursery* has endorsed the *Mendoza-Martinez* factors for consideration in the punitive/nonpunitive analysis." *Kansas v. Myers*, 260 Kan. 669, 923 P.2d 1024, 1036 (1996), *cert. denied*, 117 S. Ct. 2508 (1997); *accord Gregoire*, 124 F.3d at 1087; *Doe*, 120 F.3d at 1275-76.

The confusion generated by this Court's punishment jurisprudence must be clarified, as the different approaches suggested by this Court have led and will lead to opposite results. Indeed, Justice Scalia recognized as much in his dissent in *Kurth Ranch*, where he contrasted the *Halper* approach with the "greater severity" of the "significantly different" *Mendoza-Martinez* approach. *Kurth Ranch*, 511 U.S. at 805-06 (Scalia, J., dissenting). To illustrate one consequence of the difference: if the proper

6. Because *Hudson* may clarify the proper punishment test to use under the circumstances of this case, *see* 66 U.S.L.W. 3306 (Oct. 28, 1997) (summarizing Oct. 8, 1997 oral argument before this Court), petitioners' request that the Court hold this petition in the event that it does not find this case independently worthy of review.

7. At the same time, however, the court of appeals read *Hendricks* to alter the degree of deference owed to a legislative classification, stating that, after *Hendricks*, the "clearest proof" requirement should be applied "whenever legislative measures are challenged on the basis of the Ex Post Facto and Double Jeopardy Clauses." *E.B.*, App. B at 44a. Judge Becker disagreed with this broad reading of *Hendricks*, stating that he was "unwilling to apply the clearest proof standard in this context, *at least until the Supreme Court makes clear that doing so is appropriate*." *Id.* at 118a (Becker, J., dissenting) (emphasis added).

approach to the punishment question is to focus on the nature of the measure, rather than the nature of the proceeding, recourse to "statutory language, structure, and intent" is not especially relevant or necessary, as the question is not one of statutory construction. *Halper*, 490 U.S. at 447. It follows that the "clearest proof" doctrine, which requires a showing of the "clearest proof" to overcome legislative intent to create a civil proceeding, *see, e.g.*, *Hendricks*, 117 S. Ct. at 2082, would not be applicable. *See E.B.*, App. B at 116a-118a (Becker, J., dissenting). Whether the "clearest proof" doctrine applies or not, in turn, can and will affect the outcome of cases, as "[t]he clearest proof standard creates a nearly irrebuttable presumption that favors subjective legislative intent." *Id.* at 118a (Becker, J., dissenting).

The need for clarification of this Court's punishment jurisprudence has been noted by Justices of this Court, *see, e.g.*, *Kurth Ranch*, 511 U.S. at 803 (Scalia, J., concurring), lower federal courts, *see, e.g.*, *Artway*, 81 F.3d at 1264, and commentators alike, *see, e.g.*, Carol S. Steiker, *Punishment and Procedure: Punishment Theory and The Criminal-Civil Divide*, 85 Geo. L.J. 775, 797-99 (1997) ("The Supreme Court's divergent and inconsistent approaches to the problem of defining punishment . . . demonstrate clearly the need for a better working account."). Petitioners respectfully submit that this Court has a responsibility to ensure that rights as fundamental as those embodied by the Double Jeopardy and Ex Post Facto Clauses are clearly explicated and their scope and content clearly defined. This case provides an excellent opportunity for the Court to meet that responsibility, by offering some sorely needed doctrinal guidance, and doing so in the context of case that is also of great practical importance.

II. There Is A Split Of Authority With Regard To Whether Community Notification Imposes Punishment For Purposes Of The Ex Post Facto And Double Jeopardy Clauses.

There is a split of authority on the question whether community notification regarding sex offenders constitutes punishment. The Kansas Supreme Court has held that community notification imposes punishment. *Kansas v. Myers*, 923 P.2d 1024. The court

of appeals in this case, as well as the United States Courts of Appeals for the Second and Ninth Circuits, have held that it does not impose punishment. *See Roe v. Office of Adult Probation*, 125 F.3d 47 (2d Cir. 1997) (upholding retroactive application of Connecticut's notification policy); *Gregoire*, 124 F.3d 1079 (upholding retroactive application of Washington's "Megan's Law"); *Doe*, 120 F.3d 1263 (upholding retroactive application of New York's "Megan's Law"). As explained below, the provisions of the laws examined vary somewhat in the manner and scope of notification, but these differences do not render the split illusory. Accordingly, as described in this Court's Rule 10(a), regarding the considerations governing review on certiorari, the court of appeals in this case "has decided an important federal question in a way that conflicts with a decision by a state court of last resort." This conflict constitutes sufficient reason in itself to grant the writ of certiorari in this case.

In *Myers*, *supra*, the Kansas Supreme Court held that the passive community notification provision of the Kansas Sex Offender Registration Act, Kan. Stat. Ann. 22-4901, *et seq.*, constitutes punishment, and that its retroactive application violated the Ex Post Facto Clause. Similar to New Jersey's Megan's Law, the Kansas Act requires persons convicted of "sexually violent" crimes, which are defined in the statute, to register for at least ten years. Those who register must provide the same information as required by New Jersey's Megan's Law, except that they need not provide their home address, place of employment, or vehicle license plate number. Kan. Stat. Ann. § 22-4907. The notification provision of the Kansas Act is passive: members of the public can access the registrant information by traveling to and requesting it from their local sheriff's office. *Id.* at § 22-4909. The Kansas Act neither requires nor permits any public agency or official to engage in any affirmative public disclosure.

The Kansas Supreme Court canvassed the various approaches taken by state and lower federal courts to determining what constitutes punishment, and ultimately followed this Court's two-part inquiry in *Ursery*, and relied on the *Mendoza-Martinez* factors to assess whether the effects of Kansas' disclosure provision were punitive. *Myers*, 923 P.2d at 1036, 1040-42. The Kansas court held

that the disclosure provisions placed an affirmative disability or restraint on registrants because it "leaves open the possibility that the registered sex offender will be subjected to public stigma and ostracism," *id.* at 1041; that unlimited public access to the registry information provides a "deterrent or retributive effect" that goes beyond the remedial purpose of protecting the public, *ibid.*; and that, most importantly, the fact that the public had unlimited access to this information rendered the Act excessive. *Id.* at 1041-43. Significantly, in discussing the harm that unlimited access might cause to the registrant, the court relied heavily on and quoted extensively from the court of appeals' decision in *Artway*, observing that

> [t]he unrestricted public access leaves open the probability that a registered sex offender could suffer the kind of public stigma and ostracism that concerned the *Artway* court, although [the Kansas Act] does not provide for any affirmative action.

Id. at 1041; *see also id.* at 1042 (quoting extensively from *Artway* opinion).

The decision in this case, holding that community notification does not impose punishment, conflicts with *Myers*. The decisions of the Second and Ninth Circuits, *see Doe, supra*; *Roe, supra*; *Russell, supra*, are consistent with the holding in this case, and therefore are also in conflict with *Myers*. There is a superficial basis for distinguishing between *Myers* and the decisions in this case and those from the Second and Ninth Circuits, insofar as the Kansas Act provides for unlimited public access, which the Kansas Court found excessive, whereas the statutes at issue in the federal cases provide for more limited, but active dissemination. But a closer look at the Kansas decision, as well as consideration of the distinction between public access and dissemination, reveals that this basis for distinction is illusory and not a legitimate way to reconcile the decisions.

First, the harm from disclosure that the Kansas Court found is precisely the harm identified by petitioners in this case: public stigma and ostracism. *Compare Myers*, 923 P.2d at 1041 (*quoting*

Artway) with *E.B.*, App. B at 58a and *Artway*, 81 F.3d at 1265. This potential harm, in and of itself, was sufficient for the Kansas court to find the Kansas Act punitive, as it held: "we reason that *the repercussions*, despite how they may be justified, *are great enough* under the facts of this case *to be considered punishment*." *Myers*, 923 P.2d at 1043 (emphasis added).

Second, while the Kansas court considered the Kansas Act excessive because it allows for unlimited public access, that Act still requires citizens to make the effort to travel to their sheriff's office and request information; it does not allow officials to disseminate the information. *See id.* at 1041. New Jersey's Megan's Law, by contrast, allows for the active dissemination of the information both to organizations and to residences — *i.e.*, people do not have to do anything to receive notification regarding sex offenders in New Jersey. *See E.B.*, App. B at 11a; *see also Roe*, 125 F.3d at 51; *Doe*, 120 F.3d at 1268; *Russell*, 124 F.3d at 1082-83. In addition, although the scope of notification is supposed to be carefully tailored and limited under Megan's Law, it is wholly unrealistic in today's world to expect that notification information will not be spread by individuals and the media. *See, e.g.*, *W.P.*, App. H at 158a; N.J. Stat. Ann. 2C:7-5(b); App. J at 218a (providing immunity from liability for public employees who release Megan's Law information to the public). It seems quite likely, then, that while the Kansas Act might allow for greater disclosure in theory, New Jersey's Megan's Law will allow for much greater disclosure in fact. Indeed, the New Jersey Supreme Court, in reviewing Megan's Law in 1995 (the Kansas Act was passed in 1994), stated that "no other state has adopted such a far-reaching statute." *Poritz*, 662 A.2d at 422; *see also id.* at 428 (Stein, J. dissenting) ("none of the states with retroactive notice provisions provides for notification as extensive as that mandated by New Jersey's statutes"); *E.B.*, App. B at 102a-104a (Becker, J., dissenting) (explaining that community notification under Megan's Law is excessive both in terms of who is subject to notification and the extent of information disseminated).

For these reasons, petitioners respectfully submit that a conflict exists between a state court of last resort and three federal courts

of appeals, and that this conflict is irreconcilable. The existence of the present conflict, moreover, justifies granting certiorari in this case, whereas the lack of a conflict would have justified denying certiorari in *Myers*. Indeed, at the time that this Court denied certiorari in *Myers*, not a single federal court of appeals had addressed the question whether community notification regarding sex offenders constitutes punishment.[8] Since that time, three federal courts of appeals have done so (and the Second Circuit has issued two decisions, one addressing New York's Megan's Law and the other addressing Connecticut's), and have come to a conclusion opposite of that reached in *Myers*. A real conflict now exists, one which warrants this Court's attention.

III. This Case Is An Excellent Vehicle To Address The Questions Presented.

Whether community notification imposes punishment is a question that has now received extensive consideration by state and federal courts.[9] It has also received an enormous amount of

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8. Although petitioners understand that the denial of certiorari has no precedential effect and can be the result of a number of factors, note must be made of the fact that this Court denied certiorari in *Myers* only days after it had issued its opinion in *Hendricks*. While the denial of certiorari in *Myers* obviously does not establish this Court's agreement that community notification is punishment, it should give pause to those who might suggest that *Hendricks* has already resolved the question presented by this petition. *See generally Steiker*, *supra*, at 818, n.212 (explaining why, "[p]erhaps paradoxically, statutory schemes modeled after New Jersey's 'Megan's Law' . . . present a stronger case for being deemed punishment than 'sexually violent predator' [commitment] schemes").

9. In addition to the six decisions, from the New Jersey and Kansas Supreme Courts, and the United States Court of Appeals for the Second, Third and Ninth Circuits, already discussed, *see also Doe v. Kelley*, 961 F. Supp. 1105 (W.D. Mich. 1997); *Doe v. Weld*, 954 F. Supp. 425 (D. Mass. 1996); *State v. Pickens*, 558 N.W. 2d 396 (Iowa 1997); *Rowe v. Burton*, 884 F. Supp. 1372 (D. Alaska 1994), *appeal dismissed sub nom. Doe I v. Burton*, 85 F.3d 635 (9th Cir. 1996 (table)); *Opinion of the Justices*

(Cont'd)

attention in the academic literature.[10] In light of the intense, thorough, and conflicting scrutiny that has been directed toward

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to the Senate, 423 Mass. 1201, 668 N.E. 2d 738 (Mass. 1996); *State v. Ward*, 123 Wash. 2d 488, 869 P.2d 1062 (Wash. 1994); *State v. Noble*, 171 Ariz. 171, 829 P.2d 1217 (Ariz. 1992); *People v. Afrika*, 168 Misc. 2d 618, 648 N.Y.S. 2d 235 (Sup. Ct. Monroe County 1996); *State v. Babin*, 637 So. 2d 814 (La. Ct. App. 1994).

10. *See, e.g.*, Robert Tier & Kevin Coy, *Approaches to Sexual Predators: Community Notification and Civil Commitment*, 23 New Eng. J. on Crim. & Civ. Confinement 405 (1997); Stephen R. McAlister, *The Constitutionality of Kansas Laws Targeting Sex Offenders*, 36 Washburn L.J. 419 (1997); Brian J. Telpner, Note, *Constructing Safe Communities: Megan's Laws And The Purposes of Punishment*, 85 Geo. L.J. 2039 (1997); Mark J. Swearingen, Comment, *Megan's Law As Applied To Juveniles: Protecting Children At The Expense of Children?*, 7 Seton Hall Const. L.J. 526 (1997); Daniel L. Feldman, *The "Scarlet Letter Laws" Of The 1990s: A Response To Critics*, 60 Alb. L. Rev. 1081 (1997); Flavio K. Komuves, Comment, *For Sale: Two-Bedroom Home With Spacious Kitchen, Walk-In Closet, And Pervert Next Door*, 27 Seton Hall L. Rev. 668 (1997); *Symposium on Megan's Law, Pursuing Public Protection Through Mandatory Community Notification of Convicted Sex Offenders: The Trials and Tribulations of Megan's Law*, 6 B.U. Pub. Int. L.J. 29 (Fall 1996), Note, *Prevention versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders*, 109 Harv. L. Rev. 1711 (1996); Comment, *Megan's Law: The New Jersey Supreme Court Navigates Unchartered Waters*, 26 Seton Hall L. Rev. 764 (1996); Ryan A. Boland, Note, *Sex Offender Registration and Community Notification: Protection, Not Punishment*, 30 New. Eng. L. Rev. 183 (1995); Simeon Schopf, *Megan's Law: Community Notification and the Constitution*, 29 Colum. J.L. & Soc. Probs. 117 (1995); Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 Calif. L. Rev. 885 (1995); Michelle Pia Jerusalem, Note, *A Framework for Post-Sentence Sex Offender Legislation: Perspectives on Prevention, Registration, and the Public's "Right" to Know*, 48 Vand. L. Rev. 219 (1995); Kenneth Crimaldi, Note, *"Megan's Law": Election-Year Politics and Constitutional Rights*, 27 Rutgers L.J. 169 (1995); Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated With The Scarlet Letter Laws of the 1990s*, 90 N.W. U.L. Rev. 788 (1996).

this question, petitioners respectfully submit that further percolation of this issue is not necessary and would not likely assist this Court's resolution of the questions presented.

At the same time, this case, and the opinions below, offer an excellent vehicle for addressing the issues raised by community notification. Although petitioners obviously disagree with their conclusion, the majority's approach is thoroughly researched and vigorously argued. The majority's opinion also relies on an equally impressive earlier opinion by the same court, *Artway*, *supra*, in which the court of appeals first established its three-prong punishment test. This case also contains an excellent dissent by Judge Becker, the author of the *Artway* opinion and an esteemed jurist who has been on the court of appeals since 1981, when he was appointed by President Reagan. Judge Becker concluded, based on an historical analysis, that community notification must be deemed punishment. *E.B.*, App. B at 105a (Becker, J., dissenting). Finally, the Megan's Law phenomenon, which has spread like wild fire to almost every other State and into the federal government, began in New Jersey, with the passage of the statute at issue in this case — the original Megan's Law. It is only fitting that this Court examine the very law that triggered the community notification cascade in deciding whether, in its endeavor "to protect our children from the dangers of the modern world," the legislature has unduly tampered with "an essential thread in the mantle of protection that the law affords the individual citizen." *Id.* at 119a-120a (Becker, J., dissenting) (*quoting Lynce*, 117 S. Ct. at 895).

CONCLUSION

For the reasons stated above, petitioners respectfully request that the Court grant this petition for a writ of certiorari and set this case for plenary review.

Respectfully submitted,

JOHN J. GIBBONS
(Counsel of Record)
LAWRENCE S. LUSTBERG
JAMES E. RYAN
Crummy, Del Deo, Dolan,
Griffinger & Vecchione, P.C.
One Riverfront Plaza
Newark, New Jersey 07102-5497
(973) 596-4500

MICHAEL Z. BUNCHER
EDWARD L. BAROCAS
New Jersey Office of the
Public Defender
Special Hearings Unit
R.J. Hughes Justice Complex
P.O. Box 850
Trenton, New Jersey 08625
(609) 292-7677

Attorneys for Petitioners

APPENDIX A — AMENDED JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, DATED OCTOBER 3, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 96-5132 and 96-5416

E.B., (A Fictitious Name)

v.

PETER VERNIERO*, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY; CHARLES R. BUCKLEY, ACTING BERGEN COUNTY PROSECUTOR; JAMES MOSLEY, CHIEF OF POLICE OF THE CITY OF ENGLEWOOD, NEW JERSEY

PETER VERNIERO*, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY

Appellant

(*Amended per Clerk's Order of 7/16/96)

W.P., et al., Individually and as Representatives of a Class pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2)

v.

PETER VERNIERO*, Attorney General of New Jersey; JEFFREY S. BLITZ, Atlantic County Prosecutor; CHARLES R. BUCKLEY, Acting Bergen County Prosecutor; STEPHEN G. RAYMOND, Burlington County Prosecutor; JOSEPH F. AUDINO, Acting Camden County Prosecutor; STEPHEN D. MOORE, Cape May County Prosecutor; NEIL S. COOPER,

Appendix A

Acting Cumberland County Prosecutor; CLIFFORD J. MINOR, Essex County Prosecutor; HARRIS Y. COTTON, Gloucester County Prosecutor; CARMEN MESSANO, Hudson County Prosecutor; SHARON B. RANSAVAGE, Hunterdon County Prosecutor; MARYANN K. BIELAMOWICZ, Mercer County Prosecutor; ROBERT W. GLUCK, Middlesex County Prosecutor; JOHN KAYE, Monmouth County Prosecutor; W. MICHAEL MURPHY, JR., Morris County Prosecutor; DANIEL J. CARLUCCIO, Ocean County Prosecutor; RONALD S. FAVA, Passaic County Prosecutor; RONALD A. EPSTEIN, Salem County Prosecutor; MELAINE B. CAMPBELL, Acting Somerset County Prosecutor; DENNIS O'LEARY, Sussex County Prosecutor; EDWARD NEAFSEY, Acting Union County Prosecutor; JOHN J. O'REILLY, Warren County Prosecutor

W.P., et al., Individually and as Representatives of a Class pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2),

Appellants

(*Amended per Clerk's order of 7/15/96)

On Appeal from the United States District Court
For the District of New Jersey
(D.C. Civil Action Nos. 96-cv-00130; 95-cv-00098 and 96-cv-00097)

Present: Becker, Stapleton, and Nygaard, *Circuit Judges*

AMENDED JUDGMENT

These causes came on to be heard on the record from the United States District Court for the District of New Jersey and were argued by counsel on October 21, 1996.

Appendix A

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in E.B.'s case is hereby reversed and the cause is remanded to the District Court with instructions to dismiss the appeal for want of subject matter jurisdiction. On consideration of the issues raised in W.P.'s case, it is now here ordered and adjudged by this Court that the application of Megan's Law to the class certified by the district court will not violate the Ex Post Facto or Double Jeopardy Clauses of the Constitution. The Due Process Clause, however, would be violated by any Tier 2 or Tier 3 notification that occurred without a prior opportunity to challenge the registrant's classification and notification plan in a hearing at which the prosecutor has the burden of persuasion and must prove her case by clear and convincing evidence. Accordingly, the judgment of the district court will be reversed and remanded with instruction (1) to enter an injunction foreclosing notification in Tier 2 and Tier 3 cases without compliance with these requirements of procedural due process, and (2) to deny any further relief.

ATTEST:

s/ P. Douglas Sisk
Clerk

Dated: October 3, 1997

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, DATED AUGUST 20, 1997

E.B., (A Fictitious Name)

v.

Peter VERNIERO*, Attorney General of the State of New Jersey; Charles R. Buckley, Acting Bergen County Prosecutor; James Mosley, Chief of Police of the City of Englewood, New Jersey.

Peter Verniero*, Attorney General of the State of New Jersey, Appellant in No. 96-5132.

W.P., et al., Individually and as Representatives of a Class pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2),

v.

PETER VERNIERO, Attorney General of New Jersey; Jeffrey S. Blitz, Atlantic County Prosecutor; Charles R. Buckley, Acting Bergen County Prosecutor; Stephen G. Raymond, Burlington County Prosecutor; Joseph F. Audino, Acting Camden County Prosecutor; Stephen D. Moore, Cape May County Prosecutor; Neil S. Cooper, Acting Cumberland County Prosecutor; Clifford J. Minor, Essex County Prosecutor; Harris Y. Cotton, Gloucester County Prosecutor; Carmen Messano, Hudson County Prosecutor; Sharon B. Ransavage, Hunterdon County Prosecutor; Maryann K.**

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* Amended per Clerk's order of 7/15/96

** Amended per Clerk's order of 7/16/96

Appendix B

Bielamowicz, Mercer County Prosecutor; Robert W. Gluck, Middlesex County Prosecutor; John Kaye, Monmouth County Prosecutor; W. Michael Murphy, Jr., Morris County Prosecutor; Daniel J. Carluccio, Ocean County Prosecutor; Ronald S. Fava, Passaic County Prosecutor; Ronald A. Epstein, Salem County Prosecutor; Melaine B. Campbell, Acting Somerset County Prosecutor; Dennis O'Leary, Sussex County Prosecutor; Edward Neafsey, Acting Union County Prosecutor; John J. O'Reilly, Warren County Prosecutor.

W.P., et al., Individually and as Representatives of a Class pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2), Appellants in No. 96-5416.

Nos. 96-5132, 96-5416.

United States Court of Appeals,
Third Circuit.

Argued Oct. 21, 1996.

Decided Aug. 20, 1997.

As Amended Sept. 4, 1997.

* * *

BEFORE: BECKER, STAPLETON and NYGAARD, Circuit Judges.

OPINION OF THE COURT

* * *

Appendix B

STAPLETON, Circuit Judge:

I. *INTRODUCTION*

On July 29, 1994, Megan Kanka, a seven year old child, was abducted, raped, and murdered near her home. The man who confessed to Megan's murder lived in a house across the street from the Kanka family and had twice been convicted of sex offenses involving young girls. Megan, her parents, local police, and the members of the community were unaware of the accused murderer's history; nor did they know that he shared his house with two other men who had been convicted of sex offenses.

By October 31, 1994, New Jersey had enacted the Registration and Community Notification Laws, Pub.L.1994, Chs. 128, 133 (codified at N.J.S.A. 2C:7-1 to 7-11) as part of a ten-bill package collectively referred to as "Megan's Law." This legislation required registration by those who had committed certain designated crimes involving sexual assault and provided for the dissemination of information about those required to register. Other states followed suit with their own versions of Megan's Law and Congress passed a statute requiring a state program of registration and notification as a condition of receiving certain federal funds. By May of 1996, forty-nine states had adopted sex offender registration laws and thirty-two states maintained some form of community notification program.

We have before us challenges to the constitutionality of the notification requirements of New Jersey's Megan's Law based on the Ex Post Facto, Double Jeopardy, and Due Process Clauses of the United States Constitution. The issues before us are difficult but relatively narrow. We are not called upon to decide

whether Megan's Law can constitutionally be applied to one who has committed one of the designated sex crimes after its enactment. Nor, of course, is it our responsibility to determine whether the policy judgments reflected in Megan's Law are prudent ones.

We hold that (1) the notification requirements of Megan's Law do not constitute state inflicted "punishment" on Tier 2 and Tier 3 registrants for purposes of the Ex Post Facto and Double Jeopardy Clauses; (2) the Due Process Clause of the United States Constitution forecloses New Jersey from placing the burden of persuasion on the registrant in a proceeding challenging a Tier 2 or Tier 3 classification and notification plan; and (3) the Due Process Clause requires the state at such a proceeding to shoulder the burden of justifying the classification and notification plan by clear and convincing evidence.

II. *THE MEGAN'S LAW SCHEME*

A.

Public reaction to Megan's murder was intense, and New Jersey's governor and legislature responded quickly. By August 15, 1994, two weeks after the discovery of Megan's body, bills providing for registration and community notification had been introduced in the General Assembly. Two weeks later, the General Assembly declared the bills an "emergency," allowing them to bypass committee and be passed the same day.

In the Senate, no registration or notification bills had been introduced as of August 29, 1994. However, the Law and Public Safety Committee held a hearing upon pending legislation that pre-dated Megan's Law and would have required victim

notification on the release of offenders. In connection with its consideration of that legislation, the Committee received testimony and/or written reports from, *inter alia,* the American Civil Liberties Union, municipal officials, inmates, state and federal legislators, and the Attorney General on issues related to sex offender registration and community notification. Registration and community notification bills identical to their General Assembly counterparts were introduced in the Senate on September 12, 1994. After hearing testimony from the ACLU, the New Jersey Coalition of Crime Victims, and corrections officials on September 26, 1994, the Senate Law and Public Safety Committee revised the bills by: (1) supplementing the list of crimes which require registration,[1] (2) directing the Attorney General to consult with a twelve-member Advisory Council of experts to establish guidelines concerning the risk of reoffense, (3) identifying certain factors material to the determination of risk of reoffense, and (4) narrowing the scope of community notification. The Committee then favorably reported the amended versions to the Senate, *see* Senate Law & Pub. Safety Comm., Statement to Substitute for Senate Bill No. 14 & Assembly Bill No. 85 (N.J. Sept. 26, 1994), which approved the bills on October 3. The General Assembly followed suit by debating and approving the revised bill on October 20, 1994, and Governor Whitman signed it into law on October 31, 1994.

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1. The list of crimes was expanded in order to comply with the federal registration law, which became effective September 13, 1994, and conditioned the availability of certain funds upon the creation of a sex offender registration program. *See* Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub.L. No. 103-322, Title XVII, § 170101, 108 Stat.2038 (1994) (codified at 42 U.S.C. § 14071). On May 17, 1996, the president signed a federal version of Megan's Law, which added a mandatory notification provision to the registration requirements. Pub.L. No. 104-145, 110 Stat. 1345 (1996) (codified at 42 U.S.C. § 14071(d)).

Appendix B

B.

Megan's Law establishes both a registration requirement and a three-tiered notification program. *See Artway v. Attorney General,* 81 F.3d 1235, 1243 (3d Cir.1996). The registration provisions were the subject of this court's decision in *Artway,* where we upheld their constitutionality in the face of ex post facto, double jeopardy, bill of attainder, due process, equal protection, and vagueness challenges. We there summarized the operation of the registration provision:

> The registration provision requires all persons who complete a sentence for certain designated crimes involving sexual assault after Megan's Law was enacted to register with local law enforcement. N.J.S.A. 2C:7-2b(1). Those committing these offenses and completing all incarceration, probation, and parole before the Law's enactment must register only if, at the time of sentencing, their conduct was found to be "characterized by a pattern of repetitive and compulsive behavior." *Id.*
>
> The registrant must provide the following information to the chief law enforcement officer of the municipality in which he resides: name, social security number, age, race, sex, date of birth, height, weight, hair and eye color, address of legal residence, address of any current temporary legal residence, and date and place of employment. N.J.S.A. 2C:7-4b(1). He must confirm his address every ninety days, notify the municipal law enforcement agency if he moves, and re-register with the law enforcement agency of any new municipality. N.J.S.A. 2C:7-2d to e.

> The registration agency then forwards the registrant's information, as well as any additional information it may have, to the prosecutor of the county that prosecuted the registrant. N.J.S.A. 2C:7-4c to d. The prosecutor, in turn, forwards the information to the Division of State Police, which incorporates it into a central registry and notifies the prosecutor of the county in which the registrant plans to reside. *Id.* This information is available to law enforcement agencies of New Jersey, other states, and the United States. N.J.S.A. 2C:7-5. The registration information is not open to public inspection. . . . Failure of the sex offender to comply with registration is a fourth-degree crime. [N.J.S.A. 2C:7-2a.]

81 F.3d at 1243. The registration requirement persists for a period of 15 years from the date of conviction or the date of release from a correctional facility, whichever is later. It is only after this 15 year period that a registrant may make application to the Superior Court to terminate the obligation to register. The obligation may be terminated only upon a persuasive showing that the registrant is not likely to pose a threat to the safety of others. N.J.S.A. 2C:7-2f.

C.

The registration information provides a basis for the next step — notification. The prosecutor of the county where the sex offender intends to reside and the prosecutor from the county of conviction use the registration information and other data to jointly assess the risk of reoffense by the registered individual. N.J.S.A. 2C:7-8d(1). They determine whether the sex offender poses a low (Tier 1), moderate (Tier 2), or high (Tier 3) reoffense

risk. N.J.S.A. 2C:7-8c. Every registrant at least qualifies for Tier 1 treatment, otherwise known as "law enforcement alert," where notification extends only to law enforcement agencies likely to encounter the registrant. N.J.S.A. 2C:7-8c(1). In the case of those registrants posing a moderate risk of reoffense, Tier 2 notification, or "law enforcement, school and community organization alert," issues to registered schools, day care centers, summer camps, and other community organizations which care for children or provide support to women and where individuals are likely to encounter the sex offender. N.J.S.A. 2C:7-8c(2). The high risk registrants merit Tier 3's "community notification," where members of the public likely to encounter the registrant are notified. N.J.S.A. 2C:7-8c(3).

In order to preserve uniformity in the tier classification and notification process, the state Attorney General, in consultation with an advisory council, is required to develop and promulgate guidelines to be consulted by prosecutors in assessing the degree of risk of reoffense. N.J.S.A. 2C:7-8a, d. By statute, the guidelines are required to include the following considerations:

> (1) Conditions of release that minimize risk of reoffense, including but not limited to whether the offender is under supervision of probation or parole; receiving counseling, therapy or treatment; or residing in a home situation that provides guidance and supervision;
>
> (2) Physical conditions that minimize risk of re-offense, including but not limited to advanced age or debilitating illness;
>
> (3) Criminal history factors indicative of high risk of reoffense, including:

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(a) Whether the offender's conduct was found to be characterized by repetitive and compulsive behavior;

(b) Whether the offender served the maximum term;

(c) Whether the offender committed the sex offense against a child;

(4) Other criminal history factors to be considered in determining risk, including:

(a) The relationship between the offender and the victim;

(b) Whether the offense involved the use of a weapon, violence, or infliction of serious bodily injury;

(c) The number, date and nature of prior offenses;

(5) Whether psychological or psychiatric profiles indicate a risk of recidivism;

(6) The offender's response to treatment;

(7) Recent behavior, including behavior while confined or while under supervision in the community as well as behavior in the community following service of sentence; and

(8) Recent threats against persons or expressions of intent to commit additional crimes.

N.J.S.A. 2C:7-8b.

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Pursuant to this statutory delegation of authority, the Attorney General has developed guidelines for law enforcement for classification and notification. *See* Guidelines for Law Enforcement for Notification to Local Officials and/or the Community of the Entry of a Sex Offender into the Community, June 1, 1996 ("Guidelines"). The Attorney General's Guidelines require the prosecutors to use the Registrant Risk Assessment Scale (the "Scale"), a numerical scoring system designed with the assistance of mental health and law enforcement professionals, to evaluate the degree of risk of the sex offender. *See* Registrant Risk Assessment Scale Manual, Oct. 3, 1995 ("Manual"). The New Jersey Supreme Court has said of the creation of the Scale:

> A Committee of mental health professionals and legal experts . . . developed the Scale. They examined risk assessment scales being used in the United States and Canada. After reviewing the scientific literature, the Committee selected for inclusion in the Scale those factors that met two conditions. First, all of the factors selected had to be empirically supported in the risk assessment field as criteria positively related to the risk of re-offense. Second, all of the factors selected had to be fairly concrete criteria that could be gathered in a consistent and reliable manner.

In re C.A., 146 N.J. 71, 679 A.2d 1153, 1169 (1996).

The Scale itself is a matrix with thirteen factors grouped into four general categories: (1) Seriousness of Offense; (2) Offense History; (3) Characteristics of Offender; and (4) Community Support. *See Artway*, 81 F.3d at 1244.[2] Guided by

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2. The specific factors and their organization are as follows:

(Cont'd)

the promulgated examples and commentary, the prosecutors determine whether the registrant poses a low, moderate, or high risk to the community under each of the factors and assign zero, one, or three points, respectively, for each factor. Then the prosecutors multiply these raw scores by a coefficient, reflective of the relative weight attributed to the various general categories by the creators of the Scale; raw scores for factors under Seriousness of Offense are multiplied by five, under Offense History by three, under Characteristics of Offender by two, and under Community Support by one. Prosecutors total the resulting amounts and place the registrant in the appropriate tier: Tier 1, low risk — 0 to 36 points; Tier 2, moderate risk — 37 to 73 points; and Tier 3, high risk — 74 to 111 points. Finally, the prosecutors consider the applicability of two exceptions:

> 1) If an offender has indicated that he will reoffend if

(Cont'd)

> Seriousness of Offense — (1) Degree of Force; (2) Degree of Contact; (3) Age of Victim;
>
> Offense History — (4) Victim Selection; (5) Number of Offenses/Victims; (6) Duration of Offensive Behavior; (7) Length of Time Since Last Offense; (8) History of Antisocial Acts;
>
> Characteristics of Offender — (9) Response to Treatment; (10) Substance Abuse;
>
> Community Support — (11) Therapeutic Support; (12) Residential Support; and (13) Employment/Educational Stability.

Manual at 6-10; Scale, W.P.App. at 712.

> released into the community and the available record reveals credible evidence to support this finding, then the offender will be deemed to be a high risk of reoffense regardless of the weighting procedure; and 2) if the offender demonstrates a physical condition that minimizes the risk of reoffense, including but not limited to advanced age or debilitating illness, then the offender will be deemed to be a low risk of reoffense regardless of the outcome of the weighting procedure.

Manual at 1; *see Artway*, 81 F.3d at 1244.

While the class of those who receive notification differs depending on a registrant's classification, the type of information distributed is the same regardless of the classification. The package of information provided includes the registrant's name, a recent photograph, a physical description, the offense of conviction, home address, place of employment or schooling, and a vehicle description and license plate number. "Those notified under Tier 2 are informed that the information is not to be shared with the general public, and every notification must contain a warning about the criminal consequences of vandalism, threats and assaults against the registrant or any of his associates." 81 F.3d at 1244.[3]

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3. The typical warning included in notification materials reads:

> Any actions taken by you against this individual, including vandalism of property, verbal or written threats of harm or physical assault against this person, his or her family or employer will result in your arrest and prosecution for criminal acts. THIS INFORMATION IS CONFIDENTIAL!

See, e.g., W.P.App. at 625-27 (emphasis in original).

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D.

The New Jersey courts have played an active role in refining and developing the Megan's Law scheme. *See In re G.B.*, 147 N.J. 62, 685 A.2d 1252 (1996); *In re C.A.*, 146 N.J. 71, 679 A.2d 1153 (1996); *Doe v. Poritz*, 142 N.J. 1, 662 A.2d 367 (1995). In *Doe*, the New Jersey Supreme Court upheld the constitutionality of Megan's Law and read into the statute and Guidelines certain additional procedures designed to prevent any "excessiveness of community notification." 662 A.2d at 381. First, the Court added the "likely to encounter" the registrant restriction to Tier 2 notification. *Id.*[4] As a result of the *Doe* decision, a prosecutor who has classified a registrant in Tier 2 must make an "individual determination" concerning the appropriate institutions and organizations to include in the notification program he creates. *Id.* As articulated in the Guidelines, "[t]he decision as to which groups should appropriately be notified should be made on a case-by-case basis, following careful review." Guidelines at 11. There is no "automatic inclusion of an organization simply because it is 'registered' " with the local law enforcement agencies; rather, "likely to encounter" requires "having a fair chance to encounter" the registrant. *Doe*, 662 A.2d at 385. The Guidelines interpret the Court's articulations to mean that the types of interactions which occur at the location and their attendant circumstances must demonstrate that contact with the offender is "reasonably certain." Guidelines at 6-7. They provide, for example, that if a registrant regularly stops at a gas station merely to refuel, there would not be a "fair chance to encounter" him there. *Id.* at 7.

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4. The statute already provided the "likely to encounter" limitation for Tiers 1 and 3. N.J.S.A. 2C:7-8c(1), (3).

Ordinarily, the "critical" factor for " 'likely to encounter' is geography — how close is the institution or organization, in the case of Tier Two notification, to the offender's residence or place of work or school." *Doe,* 662 A.2d at 385. However, the New Jersey Supreme Court explained:

> In some municipalities, not every institution or organization that would otherwise qualify for notification may be close enough to warrant same, but in some cases, . . . institutions or organizations in other municipalities may be close enough. The same observations can be made for Tier Three notification. We do not attempt to define the area around the offender's residence or place of work or school that may be included within the notification process, and assume it may differ from one locale to another. Depending upon the particular offender, factors other than geography may be considered if they are relevant to the offender's likely whereabouts, such as an offender's proclivity for certain locations, and geographic considerations may be affected by the nature of the offender's characteristics and the institution in question, *e.g.,* a repetitive and compulsive pedophile and a large elementary school.

Id. 662 A.2d at 385-86.

Moreover, the Guidelines provide that notification must be appropriately tailored to reach those members of the public who are at risk from the particular offender. The tailoring must include consideration of the relationship between the registrant and his prior victims. As the Guidelines suggest, sex offenders who have only victimized members of their own households

may not pose a threat to most members of the community, and those that have targeted adult women may be of little risk to children; thus, the prosecutor may appropriately limit notification as all registered community organizations are not "likely to encounter" the offenders in either example.

Doe also added to the Megan's Law scheme a requirement that the prosecutor provide the registrant with notice of a Tier 2 or Tier 3 classification and the proposed notification plan. *Id.* 662 A.2d at 382. The Court insisted that the written notice describe the manner and details of the notification plan and inform the registrant of his rights to retain counsel and to challenge the prosecutor's decisions. However, the Court "realize[d] that in some cases it may be impossible as a practical matter to give such notice, or to give it timely, and in those cases it may be dispensed with." *Id.* The Guidelines elaborate on dispensing with the notice requirement:

> [I]f a Prosecutor['s] Office does not receive notification of release of a person determined to be a Tier 3 offender until after the date of release, then, in order to protect the public, notice to the offender may be dispensed with. The Prosecutor's Office may apply to the designated judge for an order allowing notification to take place without service of notice to the offender, upon receipt of the judge's order. This may occur, for example, when an offender who has been civilly committed is released on short notice by a judge.
>
> Also, cases will arise where registrants will avoid service of the notice. In those cases, the Prosecutor's Office may apply to the designated judge for an order allowing notification to take place without service of

> notice to the offender, where the Prosecutor can demonstrate that every good faith effort was made within the allotted timeframe to serve the registrant. If service has not been completed within 3 days of the date that the tier decision is made, then the Prosecutor may apply to the court for the order allowing notification to occur without notice to the registrant.

Guidelines at 17-18.

Finally, *Doe* required the state to make available a pre-notification judicial review process for sex offenders who wish to contest their classification or the notification plan. 662 A.2d at 382. The registrant bears the burden of persuasion in these summary, *in camera* proceedings, where the court decides only whether to affirm or reverse the prosecutor's determination. Thus, where the state has met its burden of presenting evidence that "*prima facie* justifies the proposed level and manner of notification," the court will affirm the prosecutor's determination "unless it is persuaded by a preponderance of the evidence that it does not conform to the laws and Guidelines." *Id.* 662 A.2d at 383. The "only issue for the court on the Tier level of notification is the risk of reoffense;" review of the notification plan largely involves interpretation and application of the "mandatory" limits on notification, such as the "likely to encounter" standard, articulated in the *Doe* opinion. *Id.* 662 A.2d at 383-84. Still, the courts are to understand that "the Scale is merely a tool," *In re G.B.*, 685 A.2d at 1261, and they are cautioned not to "blindly follow the numerical calculations" but to make a "case-by-case" determination regarding tier classification and scope of notification. *In re C.A.*, 679 A.2d at 1171-72.

The New Jersey Supreme Court has recognized that "a

registrant is entitled to lodge three distinct challenges to his tier designation":

> First, a registrant may introduce evidence that the calculation that led to the Scale score was incorrectly performed either because of a factual error, because the registrant disputes a prior offense, because the variable factors were improperly determined, or for similar reasons. Second, a registrant may introduce evidence at the hearing that the Scale calculations do not properly encapsulate his specific case; or phrased differently, a registrant may maintain that his case falls outside the "heartland" of cases and, therefore, that he deserves to be placed in a tier other than that called for by the prosecutor's Scale score. Finally, a registrant may introduce evidence that the extent of notification called for by his tier categorization is excessive because of unique aspects of his case. Challenges to the Scale itself, or challenges to the weight afforded to any of the individual factors that comprise the Scale, are not permitted. Instead, all challenges must relate to the characteristics of the individual registrant and the shortcomings of the Scale in his particular case.

In re G.B., 685 A.2d at 1264.

The registrant's hearing "is civil, not criminal, and remedial not adversarial." *In re C.A.*, 679 A.2d at 1164. It follows the "format . . . for probation violation hearings" in New Jersey. *Id.* 679 A.2d at 1166. The court possesses broad discretion over whether and to what extent witnesses and cross examination will be allowed. *Doe*, 662 A.2d at 382-83. Rules of evidence do not apply, and the court may rely on documentary evidence,

such as expert opinions, for all issues. *Id.* 662 A.2d at 383. Reliable hearsay is admissible. *In re C.A.*, 679 A.2d at 1165. Moreover, "non-conviction offenses [i.e., criminal activities that have not been the subject of a conviction] are to be considered in evaluating a registrant's risk of re-offense, provided there is sufficient evidence that the offense occurred." *Id.* 679 A.2d at 1162.

Where the proof, whether in the form of reliable hearsay, affidavits, or offers of live testimony, creates a genuine issue of material fact that the tier designation or manner of notification is inappropriate, "then the trial court should convene a fact-finding hearing and permit live testimony." *Id.* 679 A.2d at 1166. Both sides may use expert testimony, but the proceedings are not to be converted into "long drawn-out contests between experts." *Doe,* 662 A.2d at 384. Thus, courts must permit registrants to introduce expert testimony which tends to establish that the Scale does not properly account for aspects of the registrant's character or prior offense, where those aspects are relevant and material to the tier classification, and, in the court's opinion, would assist in the disposition of the case. *In re G.B.*, 685 A.2d at 1265-66.

E.

In *Artway,* we sustained the constitutionality of the provisions of Megan's Law requiring registration and Tier 1 notification. We declined, however, to address the accompanying constitutional challenge to the provisions requiring the broader notification authorized for Tier 2 and Tier 3 classifications. We found that challenge unripe in large part because the plaintiff there had not been classified and had not received a notification plan. We also noted that the record there lacked evidence of the

effects of notification on the community. 81 F.3d at 1250. For purposes of the ensuing discussion, we will follow the convention established in our *Artway* opinion, whereby "registration" includes Tier 1 notification and "notification" refers to Tier 2 and Tier 3 notification. *Id.*, 81 F.3d at 1244.

III. THE PRIOR PROCEEDINGS

We have two actions before us: *E.B. v. Verniero*, __F.3d__ (3rd Cir.1997) and *W.P. v. Verniero*. They involve identical challenges to Megan's Law; each alleges that notification violates ex post facto, double jeopardy, and procedural due process protections conferred by the United States Constitution. The plaintiffs in both actions are sex offenders who were convicted of their offenses prior to the enactment of Megan's Law. The plaintiff in the individual action, *E.B.*, comes within the broad language defining the class certified in *W.P.*, constituting:

> All persons required to register as a sex offender[*sic*] pursuant to N.J.S.A. 2C:7-1 et seq. and whose offenses were committed prior to October 31, 1994, the effective date of the New Jersey Registration and Community Notification Laws, and who have been or will be classified as a tier II or tier III offender.

W.P. v. Poritz, 931 F.Supp. 1187, 1192 (D.N.J.1996). The defendants in *E.B.* are the Attorney General, the local county prosecutor, and the police chief, while in *W.P.* they are the Attorney General and various county prosecutors.

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A.

In 1974, E.B. pled guilty in New Jersey Superior Court to three offenses of sexual abuse against young boys and received a thirty-three-year sentence. Two years later, he pled guilty in the Circuit Court in Petersburg, Virginia, to two separate murders and was sentenced to concurrent terms of twenty years of incarceration in that state to run consecutive to the New Jersey sentence. In 1979, after serving less than six years of his thirty-three-year New Jersey sentence, E.B. was paroled and extradited to Virginia to serve the murder sentences. On June 15, 1989, E.B. was paroled by Virginia. He is now free, subject to supervised release by the New Jersey Bureau of Parole until July 23, 2006.

Pursuant to Megan's law, E.B. registered with the authorities in Englewood, New Jersey. On October 24, 1995, the Bergen County Prosecutor's Office notified E.B. that he was classified as a Tier 3 sex offender and proposed to issue notification to "all public and private educational institutions and organizations within a one-half mile radius of the Plaintiff's home, and all parties who resided or worked within a one block radius of the Plaintiff's home." E.B. Complaint at ¶ 13. Upon E.B.'s objection to the classification and notification, a hearing was held in New Jersey Superior Court, Law Division. On December 18, 1995, the court ruled that the classification was appropriate and permitted notification to: (1) 82 public and private educational institutions, licensed day care centers and summer camps in Englewood, Teaneck, Bergenfield, Tenafly, Englewood Cliffs, Leonia and Fort Lee, and (2) all residences within a one block radius of E.B.'s house. E.B.'s appeals to the Appellate Division and the State Supreme Court were unsuccessful, but notification remained stayed by court order during the pendency of the proceedings.

E.B. then filed his federal action. The district court entered a preliminary injunction, enjoining the defendants from implementing notification. *E.B. v. Poritz*, 914 F.Supp. 85 (D.N.J.1996). Defendants appeal from that order and a subsequent order denying their application for a stay of the preliminary injunction.

B.

Seven plaintiffs filed the initial complaint in *W.P.* in January 1996. Two months later, when the court certified the class, there were 22 representative plaintiffs, all classified as either Tier 2 or Tier 3 and facing prosecutors' notification plans ranging in scope from notification of three schools to notification of all schools, day care centers, and registered community organizations in the city of Trenton, as well as all residents within a certain area of the city. Some of the representative plaintiffs had sought relief from a state court and were subject to the resulting state court orders. The district court promptly entered a preliminary injunction preventing notification for any of the class members. *W.P. v. Poritz*, 931 F.Supp. at 1187 (D.N.J.1996).[5]

Thereafter, the court entered summary judgment for the defendants. *W.P. v. Poritz*, 931 F.Supp. 1199 (D.N.J.1996). Plaintiffs filed this appeal from the entry of summary judgment.

C.

The record in these cases contains affidavits from registrants and state authorities, the Attorney General's publications

5. The defendants initially appealed the district court's ruling to this court, but later withdrew their appeals when the district court entered summary judgment in their favor in *W.P. v. Poritz*, 931 F.Supp. 1199 (D.N.J.1996).

concerning the Scale, registration and notification data, newspaper articles, and reports from other jurisdictions maintaining notification programs. The district court held the plaintiffs' constitutional claims were ripe for review, and no one has challenged that determination on appeal.

New Jersey's Administrative Office of the Courts reports that, as of May 6, 1996, there were 528 registrants designated as Tier 1; 585 as Tier 2; and 59 as Tier 3; or 45 percent, 50 percent, and 5 percent, respectively, of all classified registrants. According to the county prosecutors, as of May 16, 1996, notification was completed for 135 out of the 644 individuals classified to Tier 2 or Tier 3. Administrative Office information also indicates that of the 117 registrants who pursued their notification challenges to a resolution, 62 had their tier levels affirmed. Fifty-two challenges resulted in changed tier classifications and 13 resulted in modification of the scope of notification.

The record contains anecdotal evidence concerning the experiences of a total of at least nineteen sex offenders in New Jersey.[6] In only six of these cases had state-compelled

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6. There is some ambiguity as to the number of individual sex offenders whose experiences are represented in the record. In some cases, there are multiple affidavits from family members, landlords, employers, and attorneys. In a few submissions by these third parties, the sex offender's name has been redacted or referenced solely by initials, and we cannot discern whether the information refers to a sex offender already included in the record. The Attorney General characterizes the evidence as discussing the "perceptions or experiences of a total of only twenty-one individual sex offenders," six of whom have been subject to notification. Appellee-Verniero's Br. at 43. The appellants describe the record as including "affidavits of twenty-one persons who were affected by the public disclosure of a prior sex offense." Reply Br. at 17.

(Cont'd)

notification under Megan's Law been carried out. In the remaining cases, members of the community had received information about the sex offenders from sources other than a Megan's Law notification.[7] In all the cases, the sentenced offender had experienced adverse repercussions. Loss of employment, eviction, and verbal abuse were not uncommon. Vandalism and threats were experienced but considerably less frequently. Two registrant affidavits speak of physical assaults following notification. One registrant reported being physically attacked on three separate occasions. In another case, a father and son broke into the registrant's residence and assaulted a house guest whom they mistook for the sex offender. Police arrived on the scene and arrested the assailants, who were later prosecuted and convicted for criminal trespass.

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Our review reveals 17 affidavits from registrants describing the community's reaction to the knowledge of the individual's sex offenses. In addition, there are family member affidavits that clearly identify two other cases. Hence, we say we have evidence regarding the experiences of at least 19 sex offenders. The record is, however, clear that notification has issued for six of these offenders.

7. One such source is the publicity attending a public arrest and trial. A good example of this is E.B.'s case, where an intense search effort by the Guardian Angels and others resulted in the publication of his name on a radio talk show and in numerous flyers. *See* Richard Cowen, *Guardian Angels Vow to Find 'E.B.'*, The Record, Northern New Jersey, Jan. 26, 1996; Michael Markowitz, *Radio Show Airs E.B.'s Name*, The Record, Northern New Jersey, Jan. 28, 1996, at A3; Susan Edelman, *Guardian Angels Warn Residents*, The Record, Northern New Jersey, Jan. 29, 1996, at A3. (Although E.B. presses his own claim, his experiences are also a part of the *W.P.* record.) Another source is New Jersey's required notification to victims at the time of the offender's parole consideration and the time of his release. *See* N.J.S.A. 30:4-123.45, 123.48; N.J.S.A. 52:4B-44.

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According to law enforcement records, the 135 cases in which Tier 2 and Tier 3 notifications have been completed have produced only a single instance of a physical assault being reported to the authorities — the father and son attack on the person mistaken for a registrant. In addition, there was a total of four reports to law enforcement personnel of threats, harassment, or other offensive actions. In Bergen County, one Tier 3 registrant contacted the local police department and reported that his mother's car had been vandalized. In Somerset County, a juvenile who registered under Megan's Law reported to police that a harassing note had been left on his car at school. In Sussex County, the prosecutor's office received a call from the wife of a Tier 3 registrant who reported that a threatening note had been mailed to the registrant's home. In Atlantic County, a Tier 2 registrant's employer reported that the local school had disclosed the employment of the registrant and a boycott was planned for the employer's restaurant. The police defused the situation by contacting the potential picketers and the school's principal, who agreed to speak to his staff concerning the confidentiality of information received through notification.

The record also includes information from the registration and notification experiences of other jurisdictions. A review of community notification in Washington state found that of the 176 notifications completed between March 1990 and March 1993, 14 incidents of harassment were reported, ranging in severity from multiple incidents of verbal abuse to a death threat and one assault.[8]

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8. In the single assault incident, a registrant was "punched in the nose when he answered his door." Sheila Donnelly & Roxanne Lieb, Washington's Community Notification Law: A Survey of Law Enforcement 7 (Dec.1993).

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In addition, the record contains a January 1995 study by the Oregon Department of Corrections, undertaken to investigate the impact of the first 14 months of the state's 1993 community notification statute. Even before this statute, probation and parole officers with a sex offender under supervision had provided notification to "local police; immediate and extended family members in contact with the offender; victims; other residents in the offender's home; regular visitors to the home; employers; therapists; Children's Services Division; landlords and apartment managers; ministers, pastors, and other officials where the offender attends church; select neighbors; specific business[es] frequented by the offender; and close associates to the offender." Oregon Dep't of Corrections, Sex Offender Community Notification in Oregon at 7 (Jan.1995). This practice continued after enactment of the statute requiring notification to "a broader public." As of the time of the study, there had been 237 notification plans submitted under the new law. In this context, the Oregon Department of Corrections reported as follows:

> In January 1995, forty-five parole/probation sex offender specialists from thirty-five counties responded to a survey of their experience with Community Notification. These officers were responsible for a total caseload of 2,160 sex offenders. The following information was gained from the surveys and [Sex Offender Supervision] Network discussions:
>
> * * * * * *
>
> Less than 10% of offenders experienced some form of harassment. Incidents reported included name calling, graffiti, toilet papering and minor property vandalism, monitoring of a home by video camera, repeated

reports of unfounded violations to parole/probation officers, and picketing of residences.

There were two extreme cases of retaliation. One sex offender had a gun pointed at him and was threatened. In another case, a victim had tires slashed and the offender was blamed. Although the offender passed a polygraph and was accountable for the time, there were threats made that the offender's home would be burned down.

* * * * * *

Other circumstances reported by parole/probation officers included:

Community notification has made it more difficult to find residences for some sex offenders released from prison.

* * * * * *

Notification has [affected] employment opportunities for sex offenders.

* * * * * *

Businesses who were initially willing quietly to employ a sex offender sometimes do not provide jobs when the hiring will clearly become public.

Id. at 12-14.

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IV. *THE* ROOKER-FELDMAN *ISSUE*

There is a threshold jurisdictional issue for decision. The appellants in *E.B.* contend that the district court was without subject matter jurisdiction under the doctrine articulated by the Supreme Court in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). Section 1257 of Title 28 of the United States Code bestows upon the Supreme Court of the United States appellate jurisdiction to review final judgments of the highest courts of the respective states. The so-called *Rooker-Feldman* doctrine teaches that, by negative implication, the inferior federal courts lack subject matter jurisdiction to review judgments of those courts. We have interpreted the doctrine to encompass final decisions of lower state courts as well. *See Port Auth. Police Benevolent Ass'n, Inc. v. Port Auth. of N.Y. & N.J.*, 973 F.2d 169, 177-78 (3d Cir.1992).

Appellants point out that E.B. demanded and received judicial review of the prosecutor's Tier 3 classification and notification plan and that he advanced federal constitutional arguments in that proceeding for preventing the classification and notification plan from being put into effect. *See* Tr. Megan's Law Hearing (N.J.Super.Ct. Law Div. Dec. 7, 1995) at 6-9. The Superior Court, Law Division, after a hearing, rejected E.B.'s challenge and ordered that notification be given. E.B. appealed to the Appellate Division, which affirmed. The Supreme Court of New Jersey thereafter denied E.B.'s petition for certification of appeal. As appellants stress, the relief E.B. seeks in this proceeding is an injunction directing that the notification ordered by the New Jersey Superior Court, Law Division, not be carried out.

We agree with appellants that this is a paradigm situation in which *Rooker-Feldman* precludes a federal district court from proceeding. To grant E.B. relief would require an inferior federal court to determine that the New Jersey court's judgment was erroneous and would foreclose implementation of that judgment. *See FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 840 (3d Cir.1996).

The district court reached a contrary conclusion because it believed that although E.B. raised constitutional issues, he "was denied an opportunity to *meaningfully* raise constitutional challenges to Megan's Law." 914 F.Supp. at 89 (emphasis supplied). Its belief was based primarily on the fact that the Supreme Court of New Jersey in *Doe* had described a Megan's Law proceeding in the trial court as a "summary proceeding" and had stated that "the only issue for the court on the Tier level of notification is the risk of reoffense." *Id.* 914 F.Supp. at 89-90; *Doe*, 662 A.2d at 382-83. This suggested to the district court that the New Jersey courts do not consider constitutional challenges in a Megan's Law proceeding. 914 F.Supp. at 90.

If we shared the belief of the district court that E.B.'s constitutional challenges were not considered by the New Jersey courts — and, under *Doe*, could not be considered by them — we would also conclude that *Rooker-Feldman* did not deprive the district court of jurisdiction. However, we do not read the *Doe* opinion as instructing New Jersey courts to ignore properly raised claims based on the federal Constitution,[9] and it is clear

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9. Consideration of constitutional issues is not inconsistent with the expectation of the *Doe* Court that Megan's Law proceedings in the trial court will be summary in nature. Once the constitutional issues raised by that law are authoritatively resolved, they will no longer be a component of the routine process.

that the New Jersey courts do not so read that opinion. In *In re G.B.*, 286 N.J.Super. 396, 669 A.2d 303, 306 (N.J.Super.Ct. App.Div.1996), *aff'd*, 685 A.2d at 1252, the Appellate Division considered constitutional challenges and rejected them on the merits because these same issues had been previously considered and rejected in *Doe*. Shortly thereafter, the Superior and Supreme Courts of New Jersey, in appeals from a denial of relief in a Megan's Law proceeding, addressed constitutional challenges to Megan's Law for which there was no binding precedent. *See In re C.A.*, 679 A.2d at 1153. Even if there were not this clear evidence, however, we would have to "assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 15, 107 S.Ct. 1519, 1528, 95 L.Ed.2d 1(1987).

The only remaining issue with respect to E.B. and the *Rooker-Feldman* doctrine is whether a litigant can be said to have a meaningful opportunity to raise an issue in a state proceeding when the highest court of that state has rejected, in another litigant's case, the same argument the litigant wishes to raise. Our answer is in the affirmative.

Rooker-Feldman abstention is necessary to preserve the United States Supreme Court's appellate jurisdiction — as well as to limit federal court review of state court decisions to the avenue provided for such by Congress. *See Ernst v. Child and Youth Services of Chester County*, 108 F.3d 486, 491 (3d Cir.1997). The federal court structure established by Congress intends that only the Supreme Court have the opportunity to decide that a state court has reached an erroneous conclusion on a federal constitutional claim. Nothing suggests that this structure should be altered where the state court's decision is based upon what is already settled precedent in that state.

Appendix B

As we have previously observed, the interests served by *Rooker-Feldman* are quite similar to those served by giving a state court judgment res judicata effect in a subsequent federal proceeding. *Marks v. Stinson,* 19 F.3d 873, 885-86 n. 11 (3d Cir.1994); *Valenti v. Mitchell,* 962 F.2d 288, 297 (3d Cir.1992). If a litigant resorts to a state court and suffers an adverse judgment, a lower federal court must respect that judgment unless and until it is overturned. The litigant's only remedy is by way of appeal through the state court system and by way of petition to the Supreme Court of the United States thereafter.[10]

We will, accordingly, reverse the judgment of the district court in E.B.'s case[11] and remand with instructions to dismiss for want of subject matter jurisdiction.

This does not mean, however, that the district court lacked jurisdiction over the class claims in *W.P.* As we concluded in *Valenti,* 962 F.2d at 298, "*Rooker-Feldman* does not bar individual constitutional claims by persons not parties to earlier state court litigation." In *W.P.,* at least some of the representative plaintiffs were not the subject of any kind of judicial order when

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10. Where, as here, the state Supreme Court exercises its discretion against review, certiorari will lie from the intermediate appellate court to the Supreme Court of the United States. *See Interstate Circuit, Inc. v. Dallas,* 390 U.S. 676, 678 n. 1, 88 S.Ct. 1298, 1300 n. 1, 20 L.Ed.2d 225 (1968); *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 160, 74 S.Ct. 396, 98 L.Ed. 583 (1954).

11. We note that E.B. does not seek to enjoin future proceedings against him under Megan's Law. *Cf. Centifanti v. Nix,* 865 F.2d 1422, 1430 (3d Cir.1989). Rather he seeks relief from a judicial judgment in a Megan's Law proceeding that has already terminated. *See Valenti,* 962 F.2d at 297.

they filed this suit to secure injunctive relief against enforcement of Megan's Law. Indeed, neither they nor the state had petitioned any state court for any relief. The claims of these class plaintiffs were sufficient to confer subject matter jurisdiction[12] on the district court.[13]

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12. As with standing, which also "goes to the subject matter jurisdiction of the . . . court," *Page v. Schweiker,* 786 F.2d 150, 153 (3d Cir.1986), jurisdiction over the claims of a single representative plaintiff allows a court to reach the class claims. *See Sosna v. Iowa,* 419 U.S. 393, 402-03, 95 S.Ct. 553, 558-59, 42 L.Ed.2d 532 (1975); *see generally* Wright & Miller, 7A Federal Practice and Procedure § 1755 (noting that rule authorizing class actions cannot be construed to broaden or limit subject matter jurisdiction of district courts).

13. In the district court, the Attorney General asked that *W.P.* be dismissed on grounds of *Younger* abstention. The district court rejected that contention before entering its preliminary injunction. Although *Younger* abstention was raised again in the Attorney General's interlocutory appeal from the preliminary injunction, that appeal was withdrawn when the district court entered summary judgment for the defendants. In the appeal now before us, the Attorney General does not ask us to abstain from adjudicating the plaintiffs' constitutional claims; he asks rather that we affirm the district court's adjudication of those claims in his favor. We have no occasion to review the district court's disposition of the *Younger* abstention issues because the "State voluntarily chooses to submit to a federal forum." *Ohio Bureau of Employment Services v. Hodory,* 431 U.S. 471, 480, 97 S.Ct. 1898, 52 L.Ed.2d 513 (1977).

The Sussex County prosecutor, also a defendant in *W.P.*, urges in his brief that the district court erred in failing to abstain but does not ask us to remand with instructions to dismiss. Rather, he asks us to affirm the judgment in his favor if we agree with the district court and to abstain and "remit the named plaintiffs to the state courts" if we do not. Appellee-Dennis O'Leary's Br. at 41. Thus, the Sussex County prosecutor also

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Appendix B

V. *THE EX POST FACTO AND DOUBLE JEOPARDY ISSUES*

The Ex Post Facto Clause forecloses retroactive application of a law that "inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648 (1798). The Double Jeopardy Clause forbids "multiple punishments for the same offense." *United States v. Halper*, 490 U.S. 435, 440, 109 S.Ct. 1892, 1897, 104 L.Ed.2d 487 (1989). Accordingly, neither clause is implicated unless the state has inflicted "punishment." Since no one here suggests that "punishment" has a different meaning under one of these clauses than under the other, the critical issue to which we now turn is whether the notification called for in situations involving Tier 2 and Tier 3 registrants is "punishment" for purposes of the Ex Post Facto and Double Jeopardy Clauses.

A. *The* Artway *Standard*

In *Artway*, when we addressed the issue of whether registration under Megan's Law constituted "punishment," we found no Supreme Court precedent addressing a similar statutory

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"voluntarily chooses" to submit to this court's jurisdiction. *Hodory*, 431 U.S. at 480, 97 S.Ct. at 1904. Moreover, to the extent that he purports to adopt a contrary position to that asserted by New Jersey's Attorney General, we do not believe that he is entitled to do so. *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union*, 468 U.S. 491, 500 n. 9, 104 S.Ct. 3179, 3184 n. 9, 82 L.Ed.2d 373 (1984) (notwithstanding the objection of the New Jersey Casino Commission, because "the State's Attorney General has . . . agreed to our adjudication of the controversy, considerations of comity are not implicated, and we need not address the merits of the *Younger* abstention claim.").

provision. In order to "divine" a "test for punishment," we reviewed the Supreme Court case law and looked for common considerations. 81 F.3d at 1254-63. Recognizing "that the appropriate 'punishment' analysis depends on the context," we derived an "analytical framework for this case." *Id.* 81 F.3d at 1261, 1263. Specifically, we concluded that a "measure must pass a three-prong analysis — (1) actual purpose, (2) objective purpose, and (3) effect — to constitute non-punishment." *Id.* 81 F.3d at 1263.

Under this *Artway* analysis, we first look to whether the adverse effect on individuals results from a desire on the part of the legislature to punish past conduct or is a by-product of a bona fide legislative effort to remedy a perceived societal problem. "If the legislature intended Megan's Law to be 'punishment,' i.e. retribution was one of its actual purposes, then it must fail constitutional scrutiny. If, on the other hand, 'the restriction of the individual comes about as a relevant incident to a regulation,' the measure will pass this first prong." *Id.* (quoting *De Veau v. Braisted,* 363 U.S. 144, 160, 80 S.Ct. 1146, 1155, 4 L.Ed.2d 1109 (1960)).

The second inquiry — into "objective purpose" — focuses on the operation of the legislative measure and on whether analogous measures have traditionally been regarded in our society as punishment. In *Artway,* we suggested that there were three aspects of "objective purpose" that should be considered by a court before deciding whether the party challenging the statute has carried its burden of showing that an objective observer in our society would perceive the measure as punitive. *Id.* It is important to consider the measure's proportionality — whether the remedial purpose of a legislative measure purporting to be non-punitive can explain all the adverse effects on those

involved. While it is true that "even remedial sanctions carry the sting of punishment," *id.* 81 F.3d at 1260 (internal quotation marks omitted), only if the sting is not "reasonably related" to the remedial goal would an objective observer be justified in perceiving a punitive purpose, *id.* 81 F.3d at 1265. It is also important to consider history. If analogous measures have traditionally been regarded by our society as "serv[ing] punitive purposes" and the text and the legislative history do "not make [the legislature's] plausible remedial purposes clear," *id.* 81 F.3d at 1257, there is an objective basis for regarding the measure as punishment. Finally, we noted in *Artway* that some measures are intended to have a mixed salutary and deterrent effect. The examples we gave were taxes on illegal activities (like possession of drugs) and on activities that the state concededly wished to discourage. *See id.* 81 F.3d at 1259. Such mixed measures will not be deemed to have an objectively punitive purpose despite their deterrent purpose unless that deterrent purpose is an unnecessary complement to the measure's salutary operation, the measure is operating in an unusual manner inconsistent with its historically mixed purposes, or the deterrent purpose overwhelms the salutary purpose. *See id.* 81 F.3d at 1263.

"The final prong [of the *Artway* analysis] examines whether the effects — or 'sting' — of a measure is so harsh 'as a matter of degree' that it constitutes 'punishment.' " *Id.* 81 F.3d at 1266 (citing *California Dep't of Corrections v. Morales,* 514 U.S. 499, 509, 115 S.Ct. 1597, 1603, 131 L.Ed.2d 588 (1995)). This prong necessarily involves difficult line-drawing. Unfortunately, the Supreme Court case law provides only a few fixed points. We know that, under certain circumstances, the "sting" of incarceration or forfeiture of one's citizenship is sufficiently extraordinary to require a finding of punishment, *see Miller v. Florida,* 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987);

Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958), and we have recently been told that civil commitment of violent sex offenders does not, *see Kansas v. Hendricks*, __ U.S. __, 117 S.Ct. 2072, __ L.Ed.2d __ (1997).

B. *The Impact Of* Ursery *And* Hendricks

There are two recent Supreme Court cases which potentially bear upon our decision: *United States v. Ursery*, __ U.S. __, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996), and *Kansas v. Hendricks*, at __, 117 S.Ct. at 2072. Appellees insist that after *Ursery* and *Hendricks*, *Artway* does not provide an appropriate standard for determining whether Megan's Law notification constitutes "punishment" for purposes of the Ex Post Facto and Double Jeopardy Clauses. We disagree.

In *Ursery*, the Supreme Court held that "civil forfeitures . . . do not constitute 'punishment' for purposes of the Double Jeopardy Clause" even when the value of the property forfeited is arguably excessive when compared to the harm suffered by the government from the conduct giving rise to the forfeiture. at __, 116 S.Ct. at 2138. The Court first emphasized that its case law had sharply distinguished between *in rem* forfeiture proceedings and *in personam* civil fine proceedings. It explained that in the latter "it is the wrongdoer in person who is proceeded against . . . and punished" while in the former "it is the property which is proceeded against, and by resort to a legal fiction, held guilty and condemned." *Id.* at __, 116 S.Ct. at 2145 (quoting from *Various Items of Personal Property v. United States*, 282 U.S. 577, 580-81, 51 S.Ct. 282, 284, 75 L.Ed. 558 (1931)). Thus, civil forfeitures are not "criminal punishments because they [do] not impose a second *in personam* penalty for the criminal defendant's wrongdoing." *Id.* at __, 116 S.Ct. at 2141. Second,

the Court noted, "[c]ivil forfeitures, in contrast to civil penalties, are designed to do more than simply compensate the Government. Forfeitures . . . are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct. [For this reason,] it is virtually impossible to quantify, even approximately, the nonpunitive purposes served by a particular civil forfeiture." *Id.* at __, 116 S.Ct. at 2145. Accordingly, while a court can determine whether a civil fine has a punitive component by comparing its size to the harm experienced by the government, a court is not in a position "to determine whether a particular forfeiture bears no rational relationship to the nonpunitive purposes of that forfeiture." *Id.*

The holding of *Ursery* is a narrow one limited to civil forfeitures. Neither of the principal rationales supporting its conclusion is pertinent here and we find nothing in the Court's reasoning that is inconsistent with the *Artway* standard.[14] It necessarily follows that *Ursery* provides no justification for abandoning that standard. *See* Third Circuit Internal Operating Procedures 9.1.

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14. To the contrary, we believe the Court's opinion in *Ursery* confirms, directly or indirectly, that, *inter alia,* (1) measures motivated by retributive animus are punishment, (2) even when the legislative action is not so motivated, an adverse consequence resulting from an *in personam* proceeding may be punishment if it is disproportionate to the remedial goal which the measure purports to pursue, and (3) measures that have traditionally been regarded as nonpunitive are not punishment in the absence of a retributive motive. If we considered ourselves free to disregard the *Artway* standard, we would be required, once again, to "divine" a "test for punishment" by looking for common considerations in essentially the same set of Supreme Court precedents. *Artway,* 81 F.3d at 1254. With the one exception noted hereafter in the text, we see no reason to believe our result would be materially different if we repeated that process.

Appendix B

After the district court's decision in these cases, the Supreme Court decided *Kansas v. Hendricks*, at __, 117 S.Ct. at 2072. The Court there upheld a Kansas statute that provides for the civil commitment of "sexually violent predators." *See* Kan. Stat. Ann. § 59-29a01 et seq. Under the statute, a person convicted or charged with a violent sexual offense and suffering from a "mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence," § 59-29a02(a), may be confined to state custody for "control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large," § 59-29a07(a). Prior to Leroy Hendricks' scheduled release from prison, the state invoked the statute to have him confined as a sexual predator. Hendricks, who had an extensive history of molesting children, challenged the act on substantive due process, ex post facto, and double jeopardy grounds. The Supreme Court rejected all three claims and held that the state's involuntary commitment program did not constitute punishment for the purpose of ex post facto or double jeopardy.

Like *Ursery*, *Hendricks* does not establish "a single 'formula' " for identifying which legislative measures constitute punishment and which do not. *Morales*, 514 U.S. at 509, 115 S.Ct. at 1603. However, the context involved in *Hendricks* — civil commitment of sex offenders — is, obviously, more closely related to the context involved here than was the context of *Ursery*. In determining the continuing viability of *Artway*, therefore, we must give careful consideration to how Hendricks addressed the question of whether civil commitment is punishment. We find substantial overlap between the factors relied on in *Hendricks* and those that comprise the *Artway* test and we discern no need to abandon (or overhaul) *Artway*.

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The Court's analysis in *Hendricks* begins by inquiring into "the legislature's stated intent," at __, 117 S.Ct. at 2082, just as *Artway* directs that we begin with the legislature's actual purpose. The Court found Kansas' placement of the challenged provision in the probate code instead of the criminal code, and the legislature's description of its creation as a "civil commitment procedure," to be evidence of the legislature's "disavow[ing] any punitive intent." *Id.* at __, __, 117 S.Ct. at 2082, 2085. "Nothing on the face of the statute suggest[ed] that the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm." *Id.* at __, 117 S.Ct. at 2082.

Hendricks then goes beyond the legislature's stated intent to consider additional factors, including those factors *Artway* incorporates into its objective purpose prong. Like *Artway*'s inquiry into proportionality, *Hendricks* repeatedly describes how the Kansas statute is tailored to achieve its remedial purpose of protecting the public. The Court observes that prior criminal conduct is appropriately examined for the narrow evidentiary purpose of predicting dangerousness. *See id.* The Court also notes that Kansas "limited confinement to a small segment of particularly dangerous individuals," *id.* at __, 117 S.Ct. at 2085, and that those affected individuals do not "remain confined any longer than [they] suffer[ ] from a mental abnormality rendering [them] unable to control [their] dangerousness," *id.* at __, 117 S.Ct. at 2083. As the Court recognizes, "[f]ar from any punitive objective, the confinement's duration is instead linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others." *Id.* Finally, the Court observes that the individuals are subject only to the conditions placed on any involuntarily committed person in a state mental institution and not to the

"more restrictive conditions" placed on state prisoners. *Id.* at __, 117 S.Ct. at 2082.

Hendricks, like *Artway*, relied heavily on history. In the Court's view, the confinement involved is "one classic example" in a long history of measures restricting the freedom of the dangerously mentally ill — legislative initiatives which have been consistently held to be nonpunitive. *Id.* at __, 117 S.Ct. at 2083. The Court specifically analogized the Kansas confinement to the quarantines of those afflicted with highly contagious diseases, and recognized that it has "never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others." *Id.* at __, 117 S.Ct. at 2084.

There is also support in *Hendricks* for *Artway*'s inquiry into the relationship between a "mixed" measure's salutary and deterrent purposes. *Hendricks* discusses the multiple purposes of the Kansas statute, including incapacitation of dangerous sex offenders as well as their treatment, and concludes that the statute would not constitute punishment even if providing treatment were merely an "ancillary purpose" — and not the "primary" purpose — for passing the statute. *Id.* This is consistent with *Artway*'s allowance that a measure can be non-punitive even when it does not have solely "salutary" purposes such as treatment.

Though *Hendricks* does not explicitly discuss what *Artway* calls the "effects prong," we find nothing in *Hendricks* inconsistent with *Artway*'s direction to examine what the challenged measure actually does to the affected individuals. This is not to say, of course, that *Hendricks* lacks implications for the application of the effects prong. The Court held that

potentially indefinite civil commitment of dangerous sex predators is not punishment. This provides a new and important "fixed point" that is of great utility in determining on which side of the punitive/nonpunitive line to place community notification.

Although *Hendricks* thus does not suggest to us that any of the considerations identified as relevant in *Artway* are no longer relevant to a challenge based on the Ex Post Facto and Double Jeopardy Clauses, we do discern a teaching in *Hendricks* that we do not discern in the Supreme Court case law preceding *Artway*. In the course of holding that Kansas' Sexually Violent Predator Act "does not impose punishment," *id.* at __, 117 S.Ct. at 2086, the *Hendricks* Court made the following cogent observation regarding the deference that must be accorded to the legislature's judgment as to whether its action is remedial:

> Although we recognize that a "civil label is not always dispositive," *Allen* [*v. Illinois*, 478 U.S. 364, 369, 106 S.Ct. 2988, 2992, 92 L.Ed.2d 296 (1986)], we will reject the legislature's manifest intent only where a party challenging the statute provides "the clearest proof" that "the statutory scheme[is] so punitive either in purpose or effect as to negate[the State's] intention" to deem it "civil." *United States v. Ward*, 448 U.S. 242, 248-249, 100 S.Ct. 2636, 2641, 65 L.Ed.2d 742 (1980).

Id. at __, 117 S.Ct. at 2082.

As we pointed out in *Artway*, the Supreme Court had previously required this degree of deference only in cases where the issue before it was "whether a proceeding is effectively criminal so that the procedural protections of the Fifth and Sixth

Amendments must apply" in that proceeding. *Artway*, 81 F.3d at 1262 n. 26. After *Hendricks*, however, it seems clear that similar deference to the legislative judgment is required whenever legislative measures are challenged on the basis of the Ex Post Facto and Double Jeopardy Clauses.[15] While the *Hendricks* Court did characterize *Hendricks'* claim at one point as an "argument . . . that the Act establishes criminal proceedings," at __, 117 S.Ct. at 2081, the issue before the Court was whether the Act imposed "punishment" for purposes of the Ex Post Facto and Double Jeopardy Clauses, and the Court's holding was that the Act did not.

Accordingly, in *Artway* terms, if we determine that the actual legislative purpose was remedial, we must sustain Megan's Law against the current challenges unless its objective purpose or its effect are sufficiently punitive to overcome a presumption favoring the legislative judgment.

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15. This aspect of *Hendricks* was foreshadowed in *Ursery* where, as we have noted, the Court entertained a double jeopardy challenge to federal civil forfeiture legislation. After concluding that Congress had not intended the legislation as punitive, the Court observed:

> Moving to the second stage of our analysis, we find that there is little evidence, much less the "clearest proof" that we require, suggesting that forfeiture proceedings under 21 U.S.C. §§ 881(a)(6) and (a)(7), and 18 U.S.C. § 981(a)(1)(A), are so punitive in form and effect as to render them criminal despite Congress' intent to the contrary.

Ursery, at __, 116 S.Ct. at 2148 (internal quotation marks and citations omitted).

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C. *Legislative Purpose*

As we have indicated, in *Artway* we addressed only whether Tier 1 registrants under Megan's Law are subjected to punishment — that is, whether being required to register, and having the resulting disclosures available to law enforcement personnel, constitute punishment. In that context, we determined "whether the legislature's actual purpose [when enacting Megan's Law] was to punish." *Artway*, 81 F.3d at 1264. Looking to the statute's own statement of purpose[16] and the scant legislative history,[17] we found that the legislative purpose of

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16. The Legislature finds and declares:

> a. The danger of recidivism posed by sex offenders and offenders who commit other predatory acts against children, and the dangers posed by persons who prey on others as a result of mental illness, require a system of registration that will permit law enforcement officials to identify and alert the public when necessary for the public safety.
>
> b. A system of registration of sex offenders and offenders who commit other predatory acts against children will provide law enforcement with additional information critical to preventing and promptly resolving incidents involving sexual abuse and missing persons.

N.J.S.A. 2C:7-1; *Artway*, 81 F.3d at 1264.

17. The only other legislative history is the following statement that accompanied the bill when it was introduced in the state senate:

> Heinous crimes have been committed against children after [sex offenders'] release from incarceration. The most recent case involves the tragic rape and murder of seven-year-old

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Megan's Law was to identify potential recidivists and alert the public when necessary for the public safety, and to help prevent and promptly resolve incidents involving sexual abuse and missing persons. We then noted that "[p]rotecting the public and preventing crimes are the types of purposes [the Supreme Court has] found 'regulatory' and not punitive." *Id.*; *see also De Veau*, 363 U.S. at 160, 80 S.Ct. at 1154-55. We therefore concluded that the restrictive provisions of Megan's Law passed the "actual purpose" test.

Since in *Artway* we were only dealing with a challenge to registration, we were not required to definitively resolve the legal question of the actual purpose of notification.[18] However, the

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> Megan Kanka of Hamilton Township by a neighbor who had committed sex offenses against children. Residents of the neighborhood had no knowledge of the man's criminal history.
>
> Because sex offenders are likely to be unsusceptible to the "cures" offered by the prison system, the urges that cause them to commit offenses can never be eliminated but merely controlled. The danger posed by the presence of a sex offender who has committed violent acts against children requires a system of notification to protect the public safety and welfare of the community.

Senate Bill No. 14 (N.J. Sept. 12, 1994); *Artway*, 81 F.3d at 1264.

18. Appellants assert that all we determined in *Artway* was that the actual purpose of registration is remedial; they claim we said nothing about the legislative purpose for notification. They are mistaken. In *Artway*, we used what appeared to us to be the nonpunitive actual purpose of notification as the predicate for determining that the motivation for registration is remedial as well. *See* 81 F.3d at 1264 ("[I]f the legislature's actual purpose in notification was remedial, it is hard to imagine that its purpose in the predicate and less harsh step of registration was punitive.").

record evidence of legislative intent is exactly the same for both registration and notification. Nothing has been called to our attention that causes us to change the conclusion we reached in *Artway* regarding this evidence. While the appellants view the context in which Megan's Law was enacted as indicative of a punitive intent, we find it entirely consistent with its declared remedial purpose. Accordingly, we have no basis for questioning the legislature's declared purpose, which is remedial and devoid of any indication of an intent to punish. We must give substantial deference to that judgment.

D. *Objective Purpose*

In *Artway,* we concluded that registration and Tier 1 notification of law enforcement personnel was fully explained by the nonpunitive, legislative purpose. We explained:

> Here, the solely remedial purpose of helping law enforcement agencies keep tabs on these offenders fully explains requiring certain sex offenders to register. Registration may allow officers to prevent future crimes by intervening in dangerous situations. . . . [T]he registrant may face some unpleasantness from having to register and update his registration[, b]ut the remedial purpose of knowing the whereabouts of sex offenders fully explains the registration provision. . . . And the means chosen — registration and law enforcement notification only — is not excessive in any way. Registration, therefore, is certainly "reasonably related" to a legitimate goal: allowing law enforcement to stay vigilant against possible re-abuse.

81 F.3d at 1265.

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The issue now before us is whether the provisions of Megan's Law that call for dissemination of information about registrants *beyond* law enforcement personnel are also fully explained by the nonpunitive, legislative purpose. In addressing this issue, there is a lesson in the above quoted portion of *Artway* that we must keep in mind. The relevant issue is whether these provisions are " 'reasonably related' to a legitimate goal." Nothing in *Artway* or the Supreme Court cases upon which it relies requires a perfect fit between end and means. Nor does anything in *Ursery* or *Hendricks*. An absence of remedial, objective purpose is not demonstrated by pointing out that the legislature did not address what might be perceived as another aspect of the same problem or that there may be a means of serving the legislative end that would be more effective than the means chosen. If a reasonable legislator motivated solely by the declared remedial goals could have believed the means chosen were justified by those goals, then an objective observer would have no basis for perceiving a punitive purpose in the adoption of those means.

We conclude that the Tier 2 and 3 dissemination of information beyond law enforcement personnel is reasonably related to the nonpunitive goals of Megan's Law. As we have already indicated, these goals include identifying potential recidivists, notifying those who are likely to interact with such recidivists to the extent necessary to protect public safety, and helping prevent future incidents of sexual abuse. The fundamental premise of Megan's Law is that registration and carefully tailored notification can enable law enforcement and those likely to encounter a sex offender to be aware of a potential danger and "to stay vigilant against possible re-abuse." *Id.* This is not an unreasonable premise.

Moreover, these goals have not been pursued in a way that has imposed a burden on registrants that clearly exceeds the burden inherent in accomplishment of the goals. The statutory scheme is a measured response to the identified problem that does not subject all registrants to dissemination of information beyond law enforcement personnel. The Guidelines call for a risk assessment based on objective criteria, all of which might reasonably be perceived as relevant to the degree of risk presented by each registrant. This risk assessment is utilized to determine the maximum scope of the notification concerning the registrant. In the case of Tier 1 registrants, who comprise over 45% of those required to register, dissemination is limited to law enforcement personnel. In the case of the moderate risk registrants in Tier 2, who comprise 50% of those evaluated, dissemination is limited to those in the community who have responsibility for, or provide support to, those who are most likely to be victimized if the registrant recidivates. Even with respect to the 5% of registrants determined to pose higher risk, there is no unlimited public dissemination. Under the Guidelines, information is disseminated only to those who are "reasonably certain" to encounter the registrant.

Appellants nevertheless insist that the remedial goal of Megan's Law does not fully justify the means selected. First, they point to the fact that risk assessment under the Guidelines is based primarily on the registrant's past behavior. Past criminal conduct is the basis for 90 of the possible 111 points in the Registrant Risk Assessment Scale. *Id.* at 1266 n. 30. According to appellants, this Scale fails to take sufficient account of treatment or other positive changes in a registrant's life. They conclude that "the reach of this law will necessarily be excessive, encompassing those who do not actually pose a genuine risk of reoffense." Appellants' Br. at 41. However, the non-existence

of a perfect predictor of recidivism should not preclude legislative resort to a rationally based instrument of risk assessment, developed and validated by mental health professionals. The most appellants have done is to suggest that a more effective predictor might be devised; that is not enough to make the objective purpose of the predictor adopted a punitive one.[19]

Appellants further suggest that the information disseminated is often excessive in light of the stated remedial aims. The information disseminated with respect to a Tier 2 or Tier 3 registrant includes his or her name, description, recent photograph, address, place of employment or schooling, and a description of any vehicle used by him or her along with its license number. Appellants point out that some of this information will sometimes be unnecessary. "[F]or example, if the registrant works 20 or 30 miles from his home, the registrant's neighbor who receives notification is not 'likely to encounter' the registrant at his place of employment. Likewise, those who live near the same registrant's place of employment are not 'likely to encounter' the registrant at his home. Yet in both instances, notification includes the same information. . . ." *Id.*

We are not persuaded. First, information that an offender does not spend all of his time in the vicinity, but does have a residence or a place of employment/school elsewhere, may indeed serve a remedial purpose in helping individuals know when it is that they are "likely to encounter" the offender.

19. As the Court expressly recognized in *Hendricks*, "[p]revious instances of violent behavior are an important indicator of future violent tendencies." at __, 117 S.Ct. at 2080 (quoting *Heller v. Doe*, 509 U.S. 312, 323, 113 S.Ct. 2637, 2644, 125 L.Ed.2d 257 (1993)).

Moreover, even if this were not so, a decision not to expend the resources necessary to tailor each notice to the circumstances of the person receiving notice is hardly inconsistent with good faith pursuit of the declared remedial purposes.

Having found a reasonable "fit" between end and means, we turn to historical precedent. To appellants, the dissemination of information beyond law enforcement personnel is closely analogous to the well-recognized historical punishments of public shaming, humiliation and banishment as those practices were employed in colonial times. We rejected a very similar argument in *United States v. Criden*, 648 F.2d 814 (3d Cir.1981). There, the district court had denied the media the right to copy, for rebroadcast, video and audio tapes admitted into evidence and played to the jury during a criminal trial. In support of its decision to foreclose post-trial dissemination of public record information to the public, the district court made the following observation:

> The greater and more widespread the publicity about a particular criminal case, the more likely it is that penalties not prescribed by the law will be visited upon the accused and, more importantly, upon innocent relatives and friends. . . .
>
> Given the nature of our society these side effects are inevitable; indeed, it can be argued that they form an important, if unofficial, part of the sanctions imposed by society upon lawbreakers. The unfortunate fact is, however, that these side effects are not uniformly visited upon persons accused of violating the law. And, since they are not an official part of the criminal justice process, and are beyond the reach of that process, there is probably no acceptable way of ensuring uniformity of application.

Id. 648 F.2d at 824 (quoting *United States v. Criden*, 501 F.Supp. 854, 860 (E.D.Pa.1980)). In pursuing this theme, the district court likened the proposed rebroadcast to placing the defendant in public stocks.

We rejected the tendered analogy:

> Nor can we accept the [district] court's strained analogy of rebroadcast to "parading a convicted defendant through the streets, or holding him up to public ridicule by exhibiting him in a cage or in the stocks." 501 F.Supp. at 860.

Id. 648 F.2d at 825. Nor can we accept the suggested analogy between notification's re-publication of information publicly available at the time of a sex offender's trial and the holding of a convicted defendant up to public ridicule. Public shaming, humiliation and banishment all involve more than the dissemination of information. State dissemination of information about a crime and its perpetrators was unnecessary in colonial times because all in the colonial settlement would have knowledge of these matters. Rather, these colonial practices inflicted punishment because they either physically held the person up before his or her fellow citizens for shaming or physically removed him or her from the community.

The "sting" of Megan's Law for Tier 2 and 3 registrants results not from their being publicly displayed for ridicule and shaming but rather from the dissemination of accurate public record information about their past criminal activities and a risk assessment by responsible public agencies based on that information. This distinction makes a substantial difference when one looks for the relevant historical understanding of our society. Dissemination of information about criminal activity

has always held the potential for substantial negative consequences for those involved in that activity. Dissemination of such information in and of itself, however, has never been regarded as punishment when done in furtherance of a legitimate governmental interest.

When there is probable cause to believe that someone has committed a crime, our law has always insisted on public indictment, public trial, and public imposition of sentence, all of which necessarily entail public dissemination of information about the alleged activities of the accused. As this court has explained, we insist upon this public dissemination for a number of reasons: It "heightens public respect for the judicial process," it "permits the public to . . . serve as a check upon the judicial process," and it "plays an important role in the . . . free discussion of governmental affairs." *Publicker Industries, Inc. v. Cohen,* 733 F.2d 1059, 1070 (3d Cir.1984) (internal quotation marks omitted). Wholly independent of the criminal sanctions that conviction may entail, the consequences of our law requiring this public dissemination of information can be severe. In every case, a conviction becomes a matter of public record, and in many cases that conviction may receive widespread media attention. Depending upon the crime and the circumstances, information disseminated as a result of our insistence on public prosecution may be the source of a wide range of adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism and/or vigilante retribution. Employment may be lost, and the opportunity for future employment may be dramatically reduced. It may take a lifetime of effort on the part of a convicted defendant to restore previously existing relationships with those with whom he deals personally, and restoration of his reputation among others may never occur. Nevertheless, our laws' insistence that information regarding criminal proceedings be publicly disseminated is not intended as punishment and has never been regarded as such.

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We believe the required dissemination of information generated by our criminal justice system and the subsequent dissemination of "rap sheet" information to regulatory agencies, bar associations, prospective employers and interested members of the public[20] constitute far more compelling analogies than the stocks, cages, and scarlet letters referenced by appellants.[21]

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20. New Jersey law specifically guarantees public access to all court records, including those concerning criminal prosecutions. *See Doe*, 662 A.2d at 407 (citing Executive Order No. 123). Moreover, as the New Jersey Supreme Court noted in *Doe*, any person, under New Jersey law, "may obtain a complete criminal history from the State Police by providing a name and either date of birth or social security number and paying a fifteen dollar fee." *Id.*

21. "Rap Sheets" are less readily available today than in days past, but this reflects a policy judgment about the appropriate balance between the defendant's interest in getting a new start and the interest of others who might find "Rap Sheet" information relevant to their decision making. *See Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764-65, 109 S.Ct. 1468, 1477-78, 103 L.Ed.2d 774 (1989) (observing federal and state statutory and regulatory limitations on access to "Rap Sheets"). It does not reflect a general understanding that the dissemination of "Rap Sheet" information by the government is additional punishment.

While the Supreme Court recognized in *Reporters Committee* that "Rap Sheets" are protected under the privacy-for-law-enforcement-records exemption to the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(C), such protection reflects a Congressional policy judgment, not federal Constitutional law. *See id.* at 762 n. 13, 109 S.Ct. at 1476 n. 13. The Court explained:

> The question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy or the question
>
> (Cont'd)

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We also agree with appellees that various forms of state warnings about threats to public safety provide more apt analogies to Tier 2 and Tier 3 notification than the referenced colonial practices. In order to provide members of the public with an opportunity to take steps to protect themselves, the government has traditionally published appropriate warnings about a range of public hazards. Posters warning that a pictured individual is abroad in the community and to be regarded as armed and dangerous come most readily to mind. But there are others as well. The state has traditionally, for example, posted quarantine notices when public health is endangered by individuals with infectious diseases. *Cf. Hendricks,* at __, 117 S.Ct. at 2084 ("A State could hardly be seen as furthering a 'punitive' purpose by [isolating] persons inflicted with a[ ] highly contagious disease.").[22] Significantly, these warnings communicate not only facts about past events but also the fact that a public agency has found a significant future risk based on those events.

(Cont'd)

whether an individual's interest in privacy is protected by the Constitution. *See, e.g., Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975) (Constitution prohibits State from penalizing publication of name of deceased rape victim obtained from public records); *Paul v. Davis,* 424 U.S. 693, 712-714, 96 S.Ct. 1155, 1165-66, 47 L.Ed.2d 405 (1976) (no constitutional privacy right affected by publication of name of arrested but untried shoplifter).

Id.

22. Other examples are provided by the New Jersey statutes requiring public notice when an adult inmate is considered for parole and notice to victims upon a defendant's release from incarceration. *See* N.J.S.A. 30:4-123.48g & 123.45b(5); N.J.S.A. 52:4B-44b(21).

Whenever these state notices are directed to a risk posed by individuals in the community, those individuals can expect to experience embarrassment and isolation. Nevertheless, it is generally recognized that the state has a right to issue such warnings and the negative effects are not regarded as punishment. Because the closest analogies have not historically been regarded as punishment, we conclude that historical precedent does not demonstrate an objective punitive purpose.

Finally, we turn to the third consideration involved in assessing objective purpose. That consideration, as we understand it, is a savings provision — that is, even if the remedial purpose of a measure cannot fairly be said to justify all of its aspects, it will nevertheless be found nonpunitive if measures of this type, like taxes, have traditionally served both remedial and deterrent purposes and the particular measure before the court serves such purposes in a manner consistent with its analogous antecedents. Having concluded that the remedial purpose of Megan's Law justifies all of its aspects, it necessarily follows in this case, as it did in *Artway*, 81 F.3d at 1266, that this third consideration does not counsel in favor of a finding that it is punitive.

E. *Effects*

As we have indicated, we hypothesized in *Artway* that "a law [could] constitute unconstitutional 'punishment' because of its effects" even where no actual or objective punitive purpose is shown. 81 F.3d at 1260. We explained:

> [An] examination of effects, like the *Austin [v. United States*, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993),] inquiry into history, is necessary

> to limit what would otherwise be the untenable results of the *De Veau* subjective purpose inquiry and the *Halper* means-end calculus. While even a substantial "sting" will not render a measure "punishment," . . . at some level the "sting" will be so sharp that it can only be considered punishment regardless of the legislators' subjective thoughts.

Id. 81 F.3d at 1261.

It is clear from *Artway,* however, that for the effects of a measure to render it "punishment," those effects must be extremely onerous. Even deprivation of one's livelihood is not sufficiently onerous. *Flemming v. Nestor,* 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960) (termination of social security benefits); *Hawker v. People of State of New York,* 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002 (1898) (revocation of license to practice one's profession). Moreover, while *Artway*'s third prong serves as an independent hurdle that a legislative measure must surmount, when it is applied, the burden imposed must still be evaluated in the light of the importance of any legitimate governmental interest served. The only examples the case law suggests of effects sufficiently onerous are deprivation of one's United States citizenship that leaves one a "stateless person" and a complete deprivation of personal freedom (i.e., incarceration). Even these deprivations are not *per se* punishment, however. While in some circumstances making one a "stateless person" is punishment, denaturalization as a remedy for citizenship fraudulently obtained is regarded not as punishment but as a necessary part of regulating naturalization of aliens. *See Trop,* 356 U.S. at 98, 78 S.Ct. at 596-97. Even incarceration is not always punishment. Pre-trial detention and post-sentence civil commitment of dangerous offenders have

both been expressly found to be nonpunitive measures when justified by important state interests. *See United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987); *Hendricks*, at __, 117 S.Ct. at 2072.

The direct effects of Megan's Law clearly do not rise to the level of extremely onerous burdens that sting so severely as to compel a conclusion of punishment. All Megan's Law mandates is registration and notification. Under Megan's Law, New Jersey has not deprived appellants of their freedom or their citizenship. The state has imposed no restrictions on a registrant's ability to live and work in a community, to move from place to place, to obtain a professional license or to secure governmental benefits.

What concerns registrants, however, are the indirect effects: Actions that members of the community may take as a result of learning of the registrant's past, his potential danger, and his presence in the community. People interact with others based on the information they have about them. Knowing that someone is a convicted sex offender and has been evaluated as a continuing risk is likely to affect how most people treat that person.

There can be no doubt that the indirect effects of Tier 2 and Tier 3 notification on the registrants involved and their families are harsh. The record documents that registrants and their families have experienced profound humiliation and isolation as a result of the reaction of those notified. Employment and employment opportunities have been jeopardized or lost. Housing and housing opportunities have suffered a similar fate. Family and other personal relationships have been destroyed or severely strained. Retribution has been visited by private, unlawful violence and threats and, while such incidents of

"vigilante justice" are not common, they happen with sufficient frequency and publicity that registrants justifiably live in fear of them. It also must be noted that these indirect effects are not short lived. While there are suggestions in the record that the circumstances of a registrant may stabilize as time passes after notification, the statute permits repeat notification over a period of many years.

The primary sting from Megan's Law notification comes by way of injury to what is denoted in constitutional parlance as reputational interests. This includes the burdens of isolation, harassment, loss of opportunities, and the myriad of more subtle ways in which one is treated differently by virtue of being known as a potentially dangerous sex offender. The other type of indirect effect is exposure to an increased risk of private violence that can result in damage to one's property or injury to one's person. We will focus on each class of indirect effects in turn.

Injury to reputation has traditionally been regarded in our society as a serious matter. Our law of defamation has from our earliest days protected reputation and provided compensation for wrongful injury to reputational interests. It has provided recourse, for example, for those whose reputations are injured by false allegations of criminal activity. At the same time, however, reputational interests have not been accorded the same level of protection in our society as interests that have been found "implicit in the concept of ordered liberty." *Paul v. Davis,* 424 U.S. 693, 713, 96 S.Ct. 1155, 1166, 47 L.Ed.2d 405 (1976).

In *Paul v. Davis,* law enforcement officials decided to alert local area merchants to possible shoplifters who might be operating during the Christmas season. They distributed a "flyer" to 800 merchants which contained the name and "mug shot"

photo of individuals described as "Active Shoplifters." Davis, who had previously been arrested for — but never convicted of — shoplifting was included.

Davis brought a civil rights action against the law enforcement officials arguing that, by destroying his reputation in the community, they had violated his "right to privacy guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments." *Id.* at 712, 96 S.Ct. at 1166. Though acknowledging that the Constitution secures a right to personal privacy, the Supreme Court rejected the notion that Davis' interest in his reputation was sufficiently fundamental to come within that constitutional right. The Court observed:

> In *Roe* [*v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)], the Court pointed out that the personal rights found in this guarantee of personal privacy must be limited to those which are "fundamental" or "implicit in the concept of ordered liberty" as described in *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). The activities detailed as being within this definition were ones very different from that for which respondent claims constitutional protection — matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. In these areas it has been held that there are limitations on the States' power to substantively regulate conduct.
>
> Respondent's claim is far afield from this line of decisions. He claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a

> sphere contended to be "private," but instead on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.

Id. at 713, 96 S.Ct. at 1166.

The indirect effects experienced by Tier 2 and Tier 3 registrants, while quite likely more profound than those complained of by Davis, are clearly of a similar nature. Just as Davis sought constitutional protection from the consequences of state disclosure of the fact of his shoplifting arrest and law enforcement's assessment that he was a continuing risk, so registrants seek protection from what may follow disclosure of facts related to their sex offense convictions and the resulting judgment of the state that they are a continuing risk. It follows that, just as the officers' publication of the official act of Davis' arrest did not violate any fundamental privacy right of Davis', neither does New Jersey's publication (through notification) of registrants' convictions and findings of dangerousness implicate any interest of fundamental constitutional magnitude. The reputational interests asserted by appellants are "very different" from matters relating to marriage, procreation, and child rearing, and are therefore "far afield" from what has been deemed "fundamental" by the Constitution.[23]

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23. *Reporters Committee*, 489 U.S. at 749, 109 S.Ct. at 1469-70, does not call *Paul*'s teaching into question. We do not agree with the Supreme Court of New Jersey's conclusion in *Doe* that the recognition in *Reporters Committee* of a statutory right to privacy for "Rap Sheets" under FOIA dictates that a federal Constitutional right to privacy is implicated by notification. *See Doe*, 662 A.2d at 410-11. As mentioned above, *Reporters Committee* noted the differences between "privacy" under FOIA and an "individual's interest in privacy" under the federal Constitution. 489 U.S. at 762 n. 13, 109 S.Ct. at 1476 n. 13.

Hendricks, and the long line of cases on which it relies, counsels that bona fide remedial legislation may inflict very substantial individual hardship without implicating the Ex Post Facto and Double Jeopardy Clauses. It necessarily follows that some limit must be placed on the situations in which a measure's sting alone, despite its remedial purpose and effect, will constitute punishment under those clauses and that classification as punishment on the basis of sting alone must be reserved for cases involving deprivation of the interests most highly valued in our constitutional republic. "[F]reedom from physical restraint 'has always been at the core of the liberty protected' " by the Constitution. *Hendricks,* at __, 117 S.Ct. at 2079 (quoting *Foucha v. Louisiana,* 504 U.S. 71, 80, 112 S.Ct. 1780, 1785, 118 L.Ed.2d 437 (1992)). Freedom of thought and expression and freedom from state interference with the privacy interests identified in *Davis* are similarly "implicit in our concept of ordered liberty." *Davis,* 424 U.S. at 713, 96 S.Ct. at 1166. Interests such as these are sufficiently fundamental to our constitutionally secured liberty that state interference with them can be justified only by the most important of state interests.[24] *Davis* establishes that reputational interests are not among these fundamental liberty interests.

We believe the state's interest protecting the public here is

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24. As we explained in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 947 F.2d 682, 688 n. 1 (3d Cir.1991), *aff'd in part and rev'd in part,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992):

> Government interference with personal rights within the scope of the life, liberty, or property umbrella of the Due Process Clauses must be justified by a legitimate state interest; government interference with a "fundamental right" may be justified only by the most important of state interests.

similar to, and as compelling as, the state interest served by the civil commitment statute in *Hendricks*. Accordingly, based on *Hendricks*, we believe that the state's interest here would suffice to justify the deprivation even if a fundamental right of the registrant's were implicated. Given that something less than a fundamental interest is implicated, the impact of Megan's Law on the registrants' reputational interests is necessarily insufficient alone to constitute "punishment."

We now turn to the second type of indirect effects arising from notification. As we earlier observed, the record bears evidence of retributive assaults on registrants by private individuals. There is also evidence of vandalism and other damage to property of registrants and their associates. As we have also noted, however, each notification is accompanied by a warning against misuse of the information conveyed and an assurance that any private violence will be prosecuted. This is thus not a situation in which the state has encouraged private violence. Nor is it a situation in which the state has in some way incapacitated a person from taking steps to protect him- or herself against private violence or has deprived a citizen of the law enforcement protection accorded to others in the population generally. On the contrary, the state has taken affirmative steps to discourage private violence in response to notification, and is providing registrants with the law enforcement protection available to others.

We agree with the district court that the risk of private violence stems primarily from a registrant's past criminal activity. The most that can be said about notification is that the state, by disseminating accurate information about a registrant's crime and its assessment of future risk, may materially extend the period during which the increased risk of private violence

may exist. While the extension of that increased risk is understandably of concern to plaintiffs, they have not persuaded us that the magnitude of the risk is such as to require classification of its extension as punishment. Although the record reflects that personal injury and property damage from private violence has occurred, it also reflects that these occurrences are relatively rare. Of the 135 notifications completed in New Jersey for which there is record data, only two occasioned assaults or property damage deemed serious enough by the victim-registrant to warrant a report to law enforcement authorities. Even if we were prepared to broaden our consideration to include examples of physical harm to registrants not reported to police, this would increase the total number of record cases to just three. Our record with respect to Washington and Oregon also evidences that reported instances of personal injury or property damage are rare.[25]

As we view this matter, there is unfortunately a background risk of private violence that is necessarily assumed by everyone in our society. When one commits a reprehensible crime and is publicly prosecuted, that risk is undoubtedly augmented to a limited degree. The duration of that degree of augmented risk is

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25. The Supreme Court has held that "[a]mong the historic liberties . . . protected [by the Constitution is] a right to be free from . . . unjustified [state] intrusions on personal security." *Ingraham v. Wright*, 430 U.S. 651, 673, 97 S.Ct. 1401, 1413, 51 L.Ed.2d 711 (1977). For citizens who are not in the custody of the state, however, this right does not include the right to state protection from private violence. *See DeShaney v. Winnebago County Dep't of Soc. Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). The "state created danger" cases based upon this right to personal security do not recognize a right that is implicated here because they do not involve situations where the risk created is justified by the state's pursuit of a legitimate public interest. *See, e.g., Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720 (3d Cir.1989).

likely to be extended by notification pursuant to Megan's Law and this is understandably a concern for registrants. Nevertheless, we believe the Supreme Court would not regard this indirect effect of Megan's Law as sufficiently burdensome to require classification of the law as punitive. Certainly, in terms of the impact on the everyday lives of registrants, the burden of this aspect of Megan's Law pales by comparison to the civil commitment of sex offenders sanctioned in *Hendricks*.

F. *Satisfaction Of The* Artway *Test*

Because Megan's Law satisfies each of the three elements of the *Artway* test, we hold that the notification required by Megan's Law does not constitute punishment for purposes of the Ex Post Facto and Double Jeopardy Clauses.

VI. *THE PROCEDURAL DUE PROCESS ISSUES*

A. *Deprivation Of A Liberty Interest*

The Fourteenth Amendment of the United States Constitution provides that "no person shall be deprived of life, liberty, or property without due process of law." U.S. Const. Amend. XIV. Appellants insist that they have a liberty interest that entitles them to the protection of procedural due process under this provision. Appellees insist that there is no such interest.

Liberty interests that trigger procedural due process may be created by state law or by the federal constitution itself. *See Sandin v. Conner,* 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). We need not reach the issue of whether appellants have a liberty interest recognized by the federal constitution

because we are satisfied that appellants have a liberty interest created by the New Jersey Constitution of which they cannot be deprived without being accorded the process due under the Fourteenth Amendment.

If a state law requires that the freedom of a person on parole or probation cannot be taken away without cause, the state has created a liberty interest that cannot be taken away without the process due under the Fourteenth Amendment. *See Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). Similarly here, we know from *Doe* that the New Jersey Constitution gives Tier 2 and Tier 3 registrants the right to be free from Tier 2 and Tier 3 notification absent a showing of an overriding state interest. The New Jersey Supreme Court there held not only that Tier 2 and Tier 3 registrants had a right to the procedural due process guaranteed by the New Jersey Constitution, but also that they had a substantive right under that Constitution to be free of the disclosures required by Megan's Law, absent a demonstration that such disclosures are required by a legitimate and substantial state interest.[26] As the court explained:

> With its declaration of the right to life, liberty, and the pursuit of happiness, Article I, § 1 of the New Jersey Constitution encompasses the right of privacy. . . . We have found a constitutional right of privacy in many contexts, including the disclosure of confidential or

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26. *Compare Tony L. v. Childers*, 71 F.3d 1182 (6th Cir.1995), *cert. denied*, __ U.S. __, 116 S.Ct. 1834, 134 L.Ed.2d 938 (1996) (holding that state statutes which merely establish procedures and do not mandate any particular substantive result do not give rise to a state-created "liberty interest").

personal information. *Hennessey v. Coastal Eagle Point Oil Co.*, 129 N.J. 81, 96, 609 A.2d 11 (1992) (citing *In re Martin*, 90 N.J. 295, 447 A.2d 1290 (1982)).

In resolving conflicts between the government's need for information and the individual's right of confidentiality, this Court has adopted a balancing test similar to that adopted by the federal courts. *Martin, supra*, 90 N.J. at 318, 447 A.2d 1290. We concluded, in *Martin*, that " 'even if the governmental purpose is legitimate and substantial . . . the invasion of the fundamental right of privacy must be minimized by utilizing the narrowest means which can be designed to achieve the public purpose.' " *Ibid.* (quoting *Lehrhaupt v. Flynn*, 140 N.J.Super. 250, 262, 264, 356 A.2d 35 (App.Div.1976), *aff'd o.b.*, 75 N.J. 459, 383 A.2d 428 (1978)). . . .

662 A.2d at 412.[27]

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27. While it is clear that deprivation of a state created liberty interest triggers due process protection, and that a state created right to be free of physical restraint is such an interest, the scope of the phrase "liberty interest" as used in the context of the Due Process Clause has not been fully delineated. *See, e.g., Paul*, 424 U.S. at 708-09, 96 S.Ct. at 1164 (observing that deprivation of a state law right to obtain liquor in anonymity when combined with the stigma of defamation would implicate a state-created "liberty interest," while the stigma alone would not do so). The phrase "property interest" in this context has been broadly construed, however, to include contract rights, choses-in-action, and a right to state created benefits. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807, 105 S.Ct. 2965, 2972, 86 L.Ed.2d 628 (1985) (legal and equitable claims); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9-10, 98 S.Ct. 1554, 1560-61, 56 L.Ed.2d 30 (1978) (utility service); *Goss v. Lopez*, 419 U.S. 565, 574, 95 S.Ct. 729, 736, 42 L.Ed.2d

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B. *Standards For Determining The Process Due*

Having concluded that Tier 2 and Tier 3 registrants are entitled to due process under the Fourteenth Amendment of the federal Constitution, we turn to the issue of what process is due them. Appellants contend that two procedural protections are due that are absent from the Megan's Law scheme. They insist that due process requires both that the burden of persuasion at a Megan's Law hearing be on the state rather than the registrant, and that the state's burden at such a hearing be to demonstrate the propriety of the tier classification and the notification plan by clear and convincing evidence.[28]

(Cont'd)

725 (1975) (school attendance); *Perry v. Sindermann*, 408 U.S. 593, 602, 92 S.Ct. 2694, 2700, 33 L.Ed.2d 570 (1972) (employment contract). Indeed, "property interest" has been interpreted so as to extend procedural due process protection to virtually all rights that states will enforce in a court of law. With this background, we believe that the Supreme Court would interpret "liberty interest" in the context of the Due Process Clause to include a state created right to privacy like that recognized in *Doe*.

28. As we have noted, appellants also argue that the notice of a proposed notification cannot be dispensed with in emergency situations as the Supreme Court of New Jersey has suggested. We decline to address that issue for the same reason that we declined to do so in *Artway* — it is unripe. 81 F.3d at 1252; *see Abbott Labs. v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). "The right to notice is not absolute;" instead, due process provides for a right to " 'reasonably calculated' notice." *Artway*, 81 F.3d at 1252 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950)). "[T]he State cannot dispense with notice when that notice is possible and irreparable harm could result." 81 F.3d at 1252; *see United States v. Raffoul*, 826 F.2d 218, 224 (3d Cir.1987).

(Cont'd)

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Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), provides the framework we must apply to analyze both the burden of persuasion claim — whether it is the state or the registrant who must persuade the court on the material points — and the standard of proof claim — whether, if the burden of persuasion is on the state, the state must prove its case by a preponderance or by clear and convincing evidence. As Mathews teaches:

> [D]ue process is flexible and calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972). . . .

(Cont'd)

The Megan's Law standard for dispensing with notice, as articulated in *Doe* and the Guidelines, involves cases where it is "impossible as a practical matter" to give notice or to do so in a timely manner. 662 A.2d at 382; Guidelines at 17. None of the representative plaintiffs asserts that his notification issued absent notice; nor is there anything in the record indicating that New Jersey's prosecutors have ever dispensed with notice or plan to do so. The only indication we have as to what circumstances would meet the standard is the suggestion in the Guidelines that a prosecutor may apply for a court order to effect notification absent notice where she does not receive notice of the release of a sex offender until after the date of release or she can demonstrate that she made "every good faith effort" to serve a registrant who merely avoided service. Guidelines at 17-18. As in *Artway,* we simply do not have the necessary "factual matrix" against which to evaluate this standard. 81 F.3d at 1252.

There is another consideration which, as it did in *Artway,* would prevent us from reaching the notice issue here — the *Pullman* abstention doctrine. *Id.* at 1252 n. 12; *see Railroad Comm'n v. Pullman,* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). The New Jersey courts have yet to interpret the "impossible as a practical matter" standard, and "[t]o the extent state court interpretation would make the standard comport with due process, abstention would probably be appropriate even if the issue were ripe." 81 F.3d at 1252 n. 12.

> More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 334-35, 96 S.Ct. at 903.

The Supreme Court has twice applied the *Mathews* test in the specific context of a challenge to the preponderance of evidence standard of proof. *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982), posed the issue of whether due process requires the state to prove its case in a termination of parental rights proceeding by clear and convincing evidence, rather than merely by a preponderance of evidence. *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), presented the issue of the state's burden in a civil commitment proceeding. In each instance, the Court, in addition to identifying the private and public interests at stake and evaluating the relative risk of error in the particular kinds of proceedings involved, addressed whether the standard employed "fairly allocates the risk of an erroneous factfinding between the[ ] parties." *Santosky*, 455 U.S. at 761, 102 S.Ct. at 1399. As the *Santosky* Court explained:

> *Addington* teaches that, in any given proceeding, the

> minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.

Id. at 755, 102 S.Ct. at 1395.

In both *Santosky* and *Addington,* the Court held that due process required the state to carry the burden of persuasion by more than a preponderance of the evidence, since the preponderance standard requires litigants to "share the risk of error in roughly equal fashion." *Addington,* 441 U.S. at 423, 99 S.Ct. at 1808. Neither a person threatened with a termination of parental rights nor one standing in jeopardy of a civil commitment "should . . . be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." *Id.* at 427, 99 S.Ct. at 1810.

C. *Allocation Of The Burden Of Persuasion*

We first address whether the Due Process Clause permits New Jersey to allocate the burden of persuasion in a Megan's Law proceeding to the registrant. We begin, as *Mathews* directs, by identifying the private and public interests involved. The private interests that will be affected by the state's notification in Tier 2 and Tier 3 cases if the outcome of the hearing is in the state's favor are very substantial. Notification puts the registrant's livelihood, domestic tranquility, and personal relationships with all around him in grave jeopardy. This jeopardy will not only extend to virtually every aspect of the registrant's everyday life, it will also last at least 15 years. As

the New Jersey Supreme Court recognized in *Doe*, a registrant thus has a compelling interest in an accurate and reasonable disposition of the issues before the court in a Megan's Law hearing.

The state, on the other hand, has a compelling interest in protecting its citizens by giving prompt notification to potential victims and relevant caregivers with respect to registrants who are accurately determined to be Tier 2 or Tier 3 risks. New Jersey thus has a compelling interest in having an expedited, summary process. However, the state also has an interest in ensuring that its classification and notification system is both fair and accurate. Put conversely, the state has no substantial interest in notifying persons who will not come into contact with the registrant; nor has it any interest in notifying those who will come into contact with a registrant who has erroneously been identified as a moderate or high risk. *Cf. Santosky*, 455 U.S. at 766, 102 S.Ct. at 1401-02 (noting that even when the state seeks to terminate parental rights, it shares an interest with the parents in an accurate factfinding as to their fitness).

Given the respective private and public interests at stake in a Megan's Law hearing, we conclude that the burden of persuasion must be placed on the state if, compared to proceedings in which that burden is on the registrant, the risk of error will be materially reduced without materially impairing the state's ability to secure a prompt determination and without imposing substantial new administrative burdens on the state.

Our next step, then, is to identify the issues that are before the court in a Megan's Law hearing — a necessary predicate for assessing any potential reduction in the risk of error. When a challenge is mounted to a tier classification, the issues for

resolution by the court are limited to: (1) whether the Scale has been accurately applied to the facts of the case in accordance with its terms; and (2) whether there is something extraordinary about the particular registrant's case that takes it out of the "heartland" of the cases within the scope of the tier that would otherwise be indicated. *In re G.B.*, 685 A.2d at 1264. If the registrant challenges not just the tier classification but also the reasonableness of the prosecutor's notification plan, the court must also exercise a judgment about whether the scope of the proposed notification is appropriate to the risk presented by the particular registrant.

Since the validity of the Scale as a risk assessor must be accepted by the court, resolution of the first issue primarily requires factfinding — albeit factfinding in a context that poses more than a normal risk of error, as we explain hereafter. Resolution of a registrant's contention that his case is outside the "heartland" or that the notification proposed is excessive, on the other hand, necessarily involves a subjective judgment by the court regarding the degree and nature of the risk posed by the particular registrant. Thus, in resolving these issues, the court is necessarily required to assess future dangerousness. While a state is clearly entitled to require a court to undertake such an assessment, it is an undertaking involving substantial uncertainty. *See* Randy K. Otto, *On the Ability of Mental Health Professionals to "Predict Dangerousness": A Commentary on Interpretation of the "Dangerousness" Literature*, 18 Law & Psychol. Rev. 43, 45, 62-63 (1994) (noting that researchers in the 1970s began compiling data showing that the presumption that professionals could predict violent behavior was incorrect, but also noting that recent data showed "some" predictive ability); American Psychiatric Association, *Report of the American Psychiatric Association Task Force on Clinical Aspects*

of the Violent Individual 20 (1974) (concluding that "[n]either psychiatrists nor anyone else have demonstrated an ability to predict future violence or dangerousness").

Resolution of factual issues made relevant by the Scale is of critical importance to the outcome at a Megan's Law hearing. These issues include the circumstances of the crime that has required registration as well as other criminal conduct in which the registrant has allegedly engaged. *See, e.g., In re C.A.*, 679 A.2d at 1153. In every hearing, the court will be called upon to find facts relating to the circumstances of a sex offense of which the registrant has been convicted. Many of these facts will not have been determined by the trier of fact in the criminal proceeding. Since a prosecutor may also rely on conduct for which the registrant has not been convicted, the court will be called upon in some proceedings to determine the circumstances of sex offenses that have never been the subject of a criminal proceeding. Sex offenses are almost always committed in private. This means that potential witnesses with relevant knowledge of whether, and if so how, an alleged sex offense occurred are generally limited to the victim and the alleged offender. One can therefore confidently predict that there will frequently be issues of importance in Megan's Law hearings where the information available to the court will be limited to the victim's word against the word of the alleged offender.

These issues must be resolved in a proceeding in which the rules of evidence do not apply. The prosecutor may base her case entirely on hearsay, if it shows indicia of reliability. Most importantly, these issues must be resolved in a proceeding in which the registrant cannot compel testimony from the victim without the approval of the court, and the court must follow the following admonition of the New Jersey Supreme Court:

> The trial courts should only seek to compel such testimony when there is a real need for the testimony that cannot be met in an alternative manner. We expect that only in the rarest of cases will a court compel the testimony of a victim. In those cases, we suggest that, when possible, the trial court itself conduct all questioning of the victim.

Id., at 1166.

Accurate factfinding is also made more difficult by the timetable on which the proceedings must be conducted. Because of the public interest in a prompt resolution of the issues posed in any such proceeding, the Supreme Court of New Jersey has ordered that the time from the date of notice to a registrant until the time of trial court decision on the tier classification should not exceed 40 to 45 days. *See* Supreme Court of New Jersey, *Outline of Procedure for Hearings on Objections to Megan's Law Tier 2 and Tier 3 Classification and Manner of Notification Determinations* ¶ I. While clearly justified, this requirement does substantially constrict both sides in their preparations for the truthseeking hearing process.

Courts are human institutions and there is, of course, risk of error in every judicial proceeding. Given the nature of the issues typically presented in a Megan's Law hearing and the process established by New Jersey for resolving them, however, we believe the risk of error in such a hearing is substantially greater than that in a typical civil damage suit. We further conclude that, in this context, the allocation of the burden of persuasion is of critical importance and the assignment of that burden to the prosecutor will substantially reduce the risk of an erroneous outcome.

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When the court in a Megan's Law hearing simply cannot tell which of two conflicting accounts (regarding the use of force, perhaps) represents the historical truth, allocation of the burden of persuasion is likely to be outcome determinative. The same is true in those cases in which the trier of fact finds inconsistencies or implausible elements in the victim's account, but, at the same time, is inclined to discount the registrant's account because of his criminal history or the enormity of his stake in the outcome. In these cases, as well as others in which the trier of fact discounts the account of the registrant for similar reasons, requiring the prosecutor to affirmatively convince the court of the important facts can be expected to materially reduce the risk of error.

Finally, we must consider whether an allocation of the burden of persuasion to the state would materially impair the state's ability to receive a prompt determination or would impose new administrative burdens on it. Under the current procedural scheme, the state has the burden of presenting a *prima facie* case. This means, of course, that the prosecutor is already required to marshal and tender evidence that, if believed, will establish the facts she relied upon. While allocation of the burden of persuasion to the state may motivate the prosecutor to utilize live testimony rather than affidavits where substantial credibility issues are anticipated, this would not appear to impose a substantial administrative burden. Moreover, we perceive no reason to predict that any possible increase in the utilization of live witnesses would materially impair the prosecutor's ability to meet her responsibility under New Jersey's 45 day timetable for Megan's Law determinations.

Given (1) the interest of the registrant and the state in an accurate determination of the relevant issues of fact in a Megan's

Law hearing, (2) the absence of a substantial economic or other burden to the state from allocating the burden of persuasion to it, and (3) our conclusion that such an allocation will materially reduce the risk of error in those cases in which the allocation of that burden plays a role, we hold that due process requires that the prosecutor shoulder the burden of persuading the court of the truth of the facts upon which she has relied.

D. *Extent Of The State's Evidentiary Burden*

The remaining issue is whether due process requires that the prosecutor prove her facts by clear and convincing evidence, as appellants claim, rather than merely by a preponderance of evidence. *Santosky* and *Addington* require that we address whether, in light of the relative importance of the private and public interests at stake and the impact on those interests of an erroneous determination, the preponderance of evidence standard fairly allocates the risk of error between the parties. This requires "a very fundamental assessment of the comparative social costs of erroneous factual determinations" in the context of Megan's Law proceedings. *In re Winsip*, 397 U.S. 358, 370, 90 S.Ct. 1068, 1075, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring). Based on such an assessment, we must determine whether registrants can fairly "be asked to share equally with society the risk of error." *Addington*, 441 U.S. at 427, 99 S.Ct. at 1809.

We have previously identified the private and public interests at stake in a Megan's Law proceeding. For present purposes, it is important to add that the impact of an erroneous determination on those interests is significantly dissimilar. An erroneous underestimation of an individual's dangerousness will not necessarily result in harm to protected groups. Registration alone, which Megan's Law mandates regardless of an offender's

classification, allows law enforcement officials to monitor offenders and provides considerable disincentive to offenders to commit criminal acts because of the high likelihood of being apprehended. On the other hand, an overestimation of an individual's dangerousness will lead to immediate and irreparable harm to the offender: his conviction becomes public, he is officially recorded as being a danger to the community, and the veil of relative anonymity behind which he might have existed disappears.

In this context, we find *Addington* to be the most helpful authority. The civil commitment statute involved there required the court to determine, *inter alia,* whether "hospitalization [of the individual who was the subject of the proceeding] in a mental hospital [was required] for his own welfare and protection or the protection of others." *Id.* at 420, 99 S.Ct. at 1806. Thus, there, as here, the trier of fact was required to predict future dangerousness. Moreover, the interests which the state had in civil commitment proceedings under the statute were similar to the interests of the state here — protecting the public from violence — and the risks attending an erroneous finding against the state are, therefore, similar. Additionally, registrants share with individuals facing civil commitment an important interest that was stressed in *Addington.* As the Court explained:

> [I]t is indisputable that involuntary commitment to a mental hospital after a finding of probable dangerousness to self or others can engender adverse social consequences to the individual. Whether we label this phenomena "stigma" or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual.

Id. at 425-26, 99 S.Ct. at 1809.

It is true, as the state points out, that a registrant in a Megan's Law proceeding does not face the same restrictions on his physical freedom that a potential committee faces in civil commitment proceedings. It is clear from *Santosky*, however, that due process requires a clear and convincing standard even in the absence of a threat of physical restraint when the "loss threatened by [the] particular type of proceeding is sufficiently grave to warrant more than average certainty on the part of the factfinder." *Santosky*, 455 U.S. at 758, 102 S.Ct. at 1397. As the Court observed in *Santosky*:

> This Court has mandated an intermediate standard of proof — "clear and convincing evidence" — when the individual interests at stake in a state proceeding are both "particularly important" and "more substantial than mere loss of money." *Addington v. Texas*, 441 U.S. at 424, 99 S.Ct. at 1808. Notwithstanding "the state's 'civil labels and good intentions,' " *id.*, at 427, 99 S.Ct. at 1810, quoting *In re Winship*, 397 U.S. at 365-66, 90 S.Ct. at 1073-74, the Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government initiated proceedings that threaten the individual involved with "a significant deprivation of liberty" or "stigma." 441 U.S. at 426, 99 S.Ct. at 1809. *See, e.g., Addington v. Texas, supra* (civil commitment); *Woodby v. INS*, 385 U.S. at 285, 85 S.Ct. at 487-88 (deportation); *Chaunt v. United States*, 364 U.S. 350, 353, 81 S.Ct. 147, 149-50, 5 L.Ed.2d 120 (1960) (denaturalization); *Schneiderman v. United States*, 320 U.S. 118, 125, 159, 63 S.Ct. 1333, 1336-37, 1353, 87 L.Ed. 1796 (1943) (denaturalization).

Santosky, 455 U.S. at 756, 102 S.Ct. at 1396.

We must, therefore, ask whether the preponderance of evidence standard, which "allocates the risk of error nearly equally" between an erroneous overestimation or underestimation of a registrant's future dangerousness, "reflect[s] properly the [ ] relative severity" of these erroneous outcomes. *Id.* at 766, 102 S.Ct. at 1401. *Addington* supplies the answer. Because "the possible injury to the individual [registrant] is significantly greater than any possible harm to the state," the registrant, consistent with due process, cannot "be asked to share equally with society the risk of error." 441 U.S. at 427, 99 S.Ct. at 1809. It necessarily follows that the Due Process Clause requires that the state prove its case by clear and convincing evidence in a Megan's Law proceeding.

In reaching this conclusion, we have not been unmindful of the Supreme Court's decision in *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986). In *McMillan*, a Pennsylvania sentencing statute set a mandatory minimum for those convicted of a crime while using a visible firearm. The issue there was whether a "sentencing consideration," such as the presence of a firearm, need be proven by more than a preponderance of evidence. The Court held, affirming a long tradition, that proof by a preponderance of evidence is sufficient in the sentencing context. Here, however, we are not dealing with sentencing. Sentencing occurs during and is part of the criminal proceeding; its purpose is to specify the sanction to be imposed as a result of one's conviction by proof beyond a reasonable doubt. A Megan's Law hearing, by contrast, is a civil proceeding that stands apart from the criminal proceeding in which one was convicted and sentenced. *See C.A.*, 679 A.2d at 1164.[29] Moreover, as we have discussed, the factual

29. Because tier classification is a civil process, the deference due state criminal procedures, *see, e.g., Cooper v. Oklahoma*, __ U.S. __, __, 116 S.Ct. 1373, 1377, 134 L.Ed.2d 498 (1996), is not applicable here.

determinations required in a Megan's Law hearing are of greater complexity than those typically involved in sentencing. Accordingly, we conclude that it is entirely consistent with *McMillan* to require a higher standard of proof in a Megan's Law proceeding.

VII. *CONCLUSION*

Application of Megan's Law to the class certified by the district court will not violate the Ex Post Facto or Double Jeopardy Clauses of the Constitution. The Due Process Clause, however, would be violated by any Tier 2 or Tier 3 notification that occurred without a prior opportunity to challenge the registrant's classification and notification plan in a hearing at which the prosecutor has the burden of persuasion and must prove her case by clear and convincing evidence. Accordingly, the judgment of the district court will be reversed and this matter will be remanded with instructions (1) to enter an injunction foreclosing notification in Tier 2 and Tier 3 cases without compliance with these requirements of procedural due process, and (2) to deny any further relief.

BECKER, *Circuit Judge,* concurring and dissenting with respect to Parts I-V of the majority's opinion, which primarily discuss the question whether the notification provisions of the challenged statute violate the Ex Post Facto Clause or the Double Jeopardy Clause; and concurring in Part VI of the majority's opinion regarding the process due a registrant at a tier classification hearing.

* * *

The societal pressure for legislation designed to prevent

terrible tragedies such as befell Megan Kanka and her parents is hydraulic. The pressure is understandable, for Americans are a fundamentally decent people, and legislation such as Megan's Law is thus the product of good intentions. Unfortunately, however, earthly life is fraught with so much uncertainty that we cannot legislate against the vagaries of chance. In their desire to make everything right, legislators sometimes overlook this basic fact, and enact laws that not only fail to achieve their laudable ends, but also cause serious harm. This appeal involves a textbook example of that phenomenon.

I do not quarrel with much of what the majority has said in that portion of its fine opinion dealing with the definition of punishment. Importantly, I agree with its conclusion that our decision in *Artway v. Attorney General of New Jersey*, 81 F.3d 1235 (1996) remains viable even in the wake of *Kansas v. Hendricks*, __ U.S. __, 117 S.Ct. 2072, __ L.Ed.2d __ (1997), and *United States v. Ursery*, __ U.S. __, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996), and that we must apply the *Artway* test for what constitutes punishment under the Double Jeopardy Clause and the Ex Post Facto Clause to determine the validity of the challenged statute. Where we part company is over the second prong of the *Artway* test — objective (legislative) intent, a consideration that is heavily freighted with history. History, a consideration deemed by the Supreme Court to be the barometer of legitimacy in so many constitutional cases, is telling in the resolution of this appeal.

Tacitly recognizing the deep, historic roots of the plaintiff's double jeopardy and ex post facto claims, the majority deftly tiptoes over the "stocks, cages, and scarlet letters referenced by appellants," and asserts that other forms of the dissemination of information generated by our criminal justice system "constitute

far more compelling analogies" to Megan's Law. But the majority's analogies are misplaced. Warning or wanted posters and quarantine notices provide very different information from that provided by the community notification provisions of Megan's Law. Instead, the more apt historical antecedents to notification can be found in the shaming punishments of colonial America, which were indubitably and unabashedly punitive. Moreover, nothing in the design or operation of the notification provisions of Megan's Law contradicts this historical understanding. Because the history of notification evidences an objective punitive intent, and because the design or operation of notification does not negate this objective intent, the notification provisions of Megan's Law must be considered punishment under *Artway*'s second prong. I therefore dissent from the majority's conclusion in Part V that Megan's Law passes constitutional muster.

Failure to meet the second prong of the *Artway* test is fatal to the statute, and hence I do not ground my dissent on *Artway*'s third prong dealing with the "effects" of notification. However, because of the relevance of effects to application of the presumption in favor of subjective legislative intent over objective manifestations of that intent, and because of the general importance of the issue, which I think is much closer than the majority describes it, I report my conclusion that its treatment of the "effects" prong of *Artway* is quite problematic. More specifically, its novel holding that nothing short of the deprivation of a sufficiently fundamental interest can give rise to an effect that would constitute punishment is, I believe, incorrect. Further, the majority improperly narrows the *Artway* effects test both procedurally and substantively.

I join in those parts of the majority's opinion finding a

Rooker-Feldman bar to our review of E.B.'s challenge, and declaring unripe the challenge to the state's authority to dispense with notice prior to tier classification hearings in emergency situations. I also join in Part VI of the majority's opinion holding that the due process clause forbids the imposition of the burden of persuasion at a Megan's Law tier classification hearing on the offender and that that burden should be by clear and convincing evidence.

Finally, while I recognize that there is arguably a strong presumption favoring the subjective intent of a legislature in determining whether a measure is punitive such that only the clearest proof of objective intent will undermine that subjective intent, I believe that application of this standard in the present context is misplaced. The purpose of the standard is to determine legislative intent. There is thus no need to apply the standard here because the historical antecedents to notification provisions make that intent patent. Put slightly differently, assuming that such a standard does apply, I believe that the history of notification, the design of notification provisions in Megan's Law, and the effects of notification provide sufficient proof to show an objective punitive intent, notwithstanding the subjective intent to the contrary. In other words, the objective manifestations of the legislative intent evidence a punitive purpose.

I. DO THE NOTIFICATION PROVISIONS OF MEGAN'S LAW CONSTITUTE PUNISHMENT?

A. *Introduction*

The central issue in the case, as the majority's opinion makes clear, is whether the notification provisions of Megan's Law

constitute punishment.[1] If not, then neither the Ex Post Facto Clause nor the Double Jeopardy Clause is implicated.

Like the majority, I believe that *Artway* provides the proper legal standard to govern whether notification is to be considered punishment. I join in its lucid explanation as to why the *Artway* test survives the recent Supreme Court cases in *Ursery,* and in *Hendricks*. I therefore turn to how the *Artway* test applies to the notification provisions of Megan's Law. Because, as the majority explains, our conclusion in *Artway* that the actual purpose of the registration provisions of Megan's Law is non-punitive effectively requires us to conclude that the actual purpose of the notification provisions is similarly non-punitive (satisfying *Artway*'s first prong), I proceed to *Artway*'s second prong.

B. *The History Subpart of the* Artway *Test; Overview*

I begin with the so-called history subpart of the objective purpose prong of the *Artway* test. Pursuant to this subpart, if historical analysis shows that the measure in question has been regarded as punishment, and if the text or legislative history of the measure does not negate this traditional understanding, we must consider the measure punitive. *See Artway,* 81 F.3d at 1263.

It is here that I most disagree with the majority's opinion. In particular, I believe that it incorrectly frames the historical

1. As the majority notes, Megan's Law was actually a series of bills enacted by the New Jersey legislature. Hereinafter, when I refer to Megan's Law, I refer only to those provisions requiring released sex offenders to register with law enforcement officials so that such officials may, in certain circumstances, carry out community notification as to the whereabouts of these offenders. These provisions are codified in the New Jersey Code of Criminal Justice at § 2C:7-1 through § 2C:7-11.

analysis, first by relying on immaterial precedent, and then by applying insufficiently comparable historical analogues to the notification provisions of Megan's Law. A better reasoned analysis likens the notification provisions of Megan's Law to the shaming punishments of colonial America — the scarlet letters of literary fame — leaving no doubt that the objective purpose of these provisions is punitive. The discussion may be put in proper perspective by looking at Supreme Court jurisprudence, and we do not have to look beyond a few of the Supreme Court cases decided in the last month of the October 1996 term. These cases are suffused by references to and reliance on historical analysis.

Perhaps the most apposite case is *Hendricks* itself, where the Court made use of the historical understanding of a measure to determine whether it was punitive. Holding that a Kansas civil commitment statute was not punitive, the Court noted that restricting the freedom of the dangerously mentally ill "is a legitimate non-punitive governmental objective and has been historically so regarded." *Hendricks*, at __, 117 S.Ct. 2072, __.

In *Richardson v. McKnight*, __ U.S. __, 117 S.Ct. 2100, __ L.Ed.2d __ (1997), holding that prison guards employed by private prison management firms do not enjoy qualified immunity, the Court looked to the historical traditions of immunity applicable to privately employed prison guards, going so far as to examine the operation of jails in medieval England. Similarly, in *Washington v. Glucksberg*, __ U.S. __, 117 S.Ct. 2258, __ L.Ed.2d __ (1997), canvassing the historical treatment of suicide and assisted suicide, the Court noted that "for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide." *Id.* at __, 117 S.Ct. at __.

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In *Printz v. United States*, __ U.S. __, 117 S.Ct. 2365, __ L.Ed.2d __ (1997), the Court relied heavily on history in analyzing the Brady Handgun Violence Prevention Act, surveying statutes and executive actions from the earliest days of the Republic to determine whether the federal government can constitutionally require states to execute federal regulatory laws. And, in *Reno v. ACLU*, __ U.S. __, 117 S.Ct. 2329, __ L.Ed.2d __ (1997), in striking down provisions of the Communications Decency Act of 1996, the Court looked to more modern history and distinguished the Internet from radio broadcasts, noting that the Internet has no history of limited First Amendment protections.

Although I have cited only a few examples, these recently decided cases make patent that history plays a vital role in constitutional adjudication. *See* John Paul Stevens, *A Judge's Use of History*, 1989 Wis. L.Rev. 223, *passim* (suggesting that the interaction of history and the law is ripe for study and discussing the use of historical analysis in three cases).[2]

C. *Historical Analogues to Notification Provisions*

1. The Applicability of *Criden*

The majority's treatment of history focuses first on *United States v. Criden*, 648 F.2d 814 (3d Cir.1981). There, we rejected

2. Were I to conduct a more extensive canvass of the extent to which the Supreme Court relies on history in constitutional cases, this opinion would become a veritable treatise. The Court's long line of media access cases, beginning with *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980), which traces the history of open criminal trials from the days before the Norman Conquest, is but one example.

a suggested analogy between the media rebroadcast of material placed into evidence at a criminal trial and the shaming punishments of colonial America. *See id.* 648 F.2d at 825. The majority essentially argues that the notification provisions at issue here are like the challenged re-broadcast in *Criden*. It reasons that, because the challenged re-broadcast is unlike the shaming punishments, the notification provisions must also be unlike them, and hence the purpose of the notification provisions does not correspond with the purpose of the shaming punishments. I believe that the majority's reliance on *Criden* is misplaced. The notification provisions in Megan's Law are different from the rebroadcast in *Criden* in a number of respects. The most striking is that the rebroadcast itself is carried out by the private media (who obtained the information from the state), whereas the notification provisions are carried out by the state.

This distinction makes all the difference. Here, New Jersey not only made the criminal history of convicted sex offenders publicly available, it also instituted an affirmative, state-run program to disseminate that information. In one imaginable scenario, New Jersey could simply have allowed private entities to disseminate this public information about the offender's record. The state, however, chose to take the additional step of disseminating the information itself. The purpose of that deliberate decision is at issue here. To determine the objective purpose of the notification provisions, we must look to measures in which the dissemination of criminal history information is state-run, not to measures in which the dissemination occurs independently from state action. For the same reasons that *Criden* is inapposite, the majority's discussion of public indictments, public trials, the public imposition of sentence, and "rap sheets" is unhelpful. In none of these cases is the state itself actively disseminating information.

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2. Analogy to Shaming Punishments

In contrast, the state-run dissemination of criminal history information is central to the operation of shaming punishments.[3] As a result, shaming punishments are, as a group, measures that should be considered in our historical analysis. By shaming punishments, I mean a variety of punishments, common in the American colonies, ranging from the admonition to branding or maiming and banishment.

In an admonition, a magistrate or clergyman would lecture the offender privately about his misdeeds and seek his repentance. *See* Adam J. Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts,* 80 Mich. L.Rev. 1179, 1224 (1982). The offender would then offer a public apology before the community either in court, *see id.*, or in church, *see* Toni M. Massaro, *Shame, Culture, and American Criminal Law,* 89 Mich. L.Rev. 1880, 1912-13 (1991). Once forgiven by the community, the offender was drawn back into its fold, thereby restoring a moral order upset by the offense. *See id.* at 1913. In a similar vein, offenders were often forced to stand in a public place for a time displaying their offense written on their clothing or on their bodies. *See* Lawrence M. Friedman, *Crime and Punishment in American History* 38 (1993). This public display took many forms in the colonies, and might include "[s]entences to the pillory, to the stocks, to lashes at the whipping-post, and to hours on the gallows with a rope around the neck." Hirsch, *supra,* at 1225.

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3. That the form of dissemination under Megan's Law (written notice) is different from the form of dissemination of the shaming punishments (public display of the offender) is immaterial. Public display in modern society simply would not accomplish the goals of notification; not all those "likely to encounter" the released offender would be notified by public display.

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A court might also require that the offender permanently display a label representing his offense — for instance, a scarlet letter "A" for the crime of adultery. *See* Massaro, *supra,* at 1913. Such labels were generally cut from cloth and sewn on the offender's outer garments. *See* Friedman, *supra,* at 40. Another form of permanent labeling was the brand, in which the authorities burned a label directly onto the offender's body. *See id.* A murderer might be branded with an "M", a thief with a "T". *See* Jon A. Brilliant, Note, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions,* 1989 Duke L.J. 1357, 1361. Colonial New Jersey, for example, punished burglary by branding the offender's hand for a first offense, and his forehead for subsequent offenses. *See id.*

Mutilation or maiming was similar to branding except that it did not necessarily signal the precise offense the offender had committed. *See* Friedman, *supra,* at 40. A common form of mutilation or maiming was the detachment of an ear. *See id.* The effect of branding, mutilation, or maiming was often to cast the offender out of society once and for all. *See* Hirsch, *supra* at 1228. Unlike the aftermath of an admonition, the community did not welcome the offender back into society, but shunned him. *See id.* Just a short step away from branding, mutilation, and maiming, was banishment, a forced exclusion from the community. Banishment was reserved for those who presented "a permanent danger" or who engaged in "repeated criminality." *See* Friedman, *supra,* at 40. "Those who would not repent, those who could not be regathered into the bosom of society, had to be driven out." *Id.*

These various punishments were effective — they had "sting" — because each punishment publicized accurate information about the offender's misdeeds, and because of the

cultural milieu of a colonial settlement. A settlement in the American colonies was "small-town life at its most communal." *Id.* at 37. Thus, once an offense had been made public, the entire community became aware of it, and such publicity was the cause of shame. In addition, colonists have been described as ultra sensitive to criticism from their fellows, *see* Massaro, *supra,* at 1912, especially from those whom they knew and respected, *see* Hirsch, *supra,* at 1233-34. Therefore, the public dissemination of the fact that a community member had committed some offense was especially calculated to provoke shame in the wrongdoer.

As the majority recognizes, these shaming punishments often were imposed in addition to physical punishments, such as whippings. *See* Friedman, *supra,* at 40. However, the physical punishment did not lessen the "sting" associated with the public dissemination of the offense. *See* Hirsch, *supra,* at 1232 ("A sentence to whipping or the pillory had worked primarily through the media of psychic pain and shame."). In fact, the physical punishment was seen as being effective only insofar as it resulted in the offender being shamed by the publicity of his offense. *See id.* at 1233-34 ("As the aura of shame and psychic trauma surrounding the penalty evaporated, there was left behind only a small core of physical pain quite insufficient to prevent offenses."). Further, the authorities often dispensed with physical punishments altogether because the "sting" associated with the publicity was more sharp. *See id.* at 1226. Finally, some shaming punishments had no physical components at all; for instance, those condemned to display a label representing their offense did not necessarily suffer physical punishment.

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3. Warning Posters, Wanted Posters, and Quarantine Notices Compared

As the foregoing discussion makes clear, shaming punishments are analogous to the notification provisions contained in Megan's Law. But that does not end our inquiry. Other measures also rely on the state dissemination of information. The majority mentions two such measures: warning or wanted posters, and quarantine notices.[4] The question, then, is whether the notification provisions of Megan's Law are more like the shaming punishments or more like warning or wanted posters, or quarantine notices. The difficulty in pinpointing the proper historical analogy to notification provisions lies in identifying the characteristics of such provisions (in addition to the state dissemination of information) that will help us to determine their objective purpose. This analysis is further complicated, at least in part, by the fact that "[u]nquestionably punitive statutes share traits with laws that are universally accepted as [remedial]." Note, *Prevention Versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders,* 109 Harv. L.Rev. 1711, 1725 (1996).[5]

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4. In a footnote, the majority mentions common procedures that provide for public notice that an inmate is being considered for parole or is being released from incarceration. Such measures are relatively modern and therefore are probably not appropriate historical analogues to the notification provisions, and I will not dwell on them any more than the majority does.

5. My analysis here mirrors that explained in an article describing the process of legal reasoning by analogy. *See* Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy,* 109 Harv. L.Rev. 923, 965 (1996). To quote from the author:

(Cont'd)

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The majority ignores an important component of the shaming punishments when it reasons that warning or wanted posters and quarantine notices are more apt analogies to notification provisions than are the shaming punishments. The majority essentially believes that the characteristic that notification provisions share with warning or wanted posters and with quarantine notices (and the characteristic that is sufficient warrant to justify its analogy) is the general type of information that each measure disseminates. In other words, it reasons that, because notification provisions alert the community to a risk, they must be akin to warning or wanted posters and to quarantine notices which similarly alert the community to a risk.

The problem with this reasoning is that — like the warning or wanted posters, and quarantine notices — the shaming punishments also alerted the community to a risk, the risk that the offender would re-offend. *See, e.g.*, Hirsch, *supra*, at 1228 ("Less common, but equally effective, were branding and mutilation, punishments that fixed upon the offender an indelible 'mark of infamy,' to warn community members to keep their distance."); Massaro, *supra*, at 1913 ("Branding and maiming also were designed in part to prevent the offender from

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> [I]n order for an argument by analogy to be compelling . . . there must be sufficient warrant to believe that the presence in an "analogized" item of some particular characteristic or characteristics allows one to infer the presence in that item of some particular other characteristic.

Id. (footnote omitted). In this case, we are attempting to determine which characteristics of notification will allow us to infer its objective purpose by examining analogues of notification that share these characteristics and whose purpose we know.

committing future similar acts, either by warning future victims of their criminal propensities or by disabling the offender." (footnote omitted)).

Moreover, notification is a *judicially endorsed* pronouncement that the registrant presents a danger to the community. In that sense, notification is closer to the shaming punishments than to warning or wanted posters, or quarantine notices. There is no judicial involvement in the issuance of warning or wanted posters, or of quarantine notices. Judicial endorsement, by a disinterested magistrate, is different in kind from a determination by other public agencies. Therefore, one cannot contend that warning or wanted posters and quarantine notices are better analogies to the notification provisions than are the shaming punishments simply because warning or wanted posters and quarantine notices alert the community to a risk.

New Jersey argues that, because the *purpose* of the notification provisions and that of measures such as warning or wanted posters, or quarantine notices is to alert the community to some danger (a remedial purpose), we must consider notification provisions historically analogous to these other measures. As the foregoing discussion suggests, this argument is flawed. The goal of the history subpart of the *Artway* test was to determine the objective purpose of a particular measure by examining the historical understandings of analogues to the measure in question. It does not comport with this methodology to choose as data points historical analogues based solely on the claim that they served the same purpose as the measure in question. To do so would assume the very issue that is in dispute, and then reach a conclusion by way of circular reasoning.

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4. The Mechanism of Notification; Its Relation to the Choice of Historical Analogues

Because we are concerned with the objective purpose of the state dissemination of information, we must examine the particular information the state chooses to disseminate in order to determine that objective purpose. As the majority describes the process of notification, New Jersey provides recipients of notification with the following information: the identity of the convicted sex offender, his physical description, the location of his dwelling, the place of his employment, a description of his automobile, his license plate number, and the offense(s) for which he was convicted and by which the notification was triggered.[6]

This is the same type of information the state disseminated in carrying out the shaming punishments. Because the offender would have been well known to those who witnessed the shaming punishment, simply by placing the offender on display before the community was enough to disseminate his identity, his physical description, the location of his dwelling, and the place of his employment.[7] In fact, the shaming punishments became less frequent when such information could not be conveyed by

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6. I rely here on the type of information released pursuant to the Attorney General's guidelines implementing notification. *See* N.J. Stat. Ann. § 2C:7-8(d) (1995). I assume that the guidelines accurately reflect the legislative purpose in this respect.

7. Contrary to the majority's assertions, there is no evidence of which I am aware that a colonial settlement would have known prior to the shaming itself of an offender's crime. I suspect that if the community was already aware of the crime, then shaming punishments would be unnecessarily duplicative.

public display alone. *See* Hirsch, *supra,* at 1228-34 (describing the decreased use of shaming punishments as colonial communities grew in size thereby increasing the likelihood that the offender was a stranger to the witnesses of his punishment); *see also* Dan M. Kahan, *What do Alternative Sanctions Mean?,* 63 U. Chi. L.Rev. 591, 631 (1996) ("Early Americans turned to imprisonment in large part because they believed that existing criminal penalties had lost the power to shame.").[8] Moreover, as noted above, central to many of the shaming punishments was some notice — e.g., a sign, a label, or a brand — of the offense(s) for which the offender was being punished.

In contrast, warning or wanted posters and quarantine notices do not disseminate the same type of information disseminated by notification provisions. A warning or wanted poster, displayed in an effort to catch escaped prisoners or to arrest alleged criminals, obviously does not include information about the location of the offender's current dwelling, nor of his current employment. If the authorities had this information, they would know how to apprehend the offender. Such posters also typically include information about the facts of the individual's escape in the case of a warning poster, and the facts of the individual's alleged crime in the case of a wanted poster. Quarantine notices, too, include information different from that included in notification provisions. The most prominent

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8. In an interesting, perhaps ironic twist, the need for notification provisions arises because of the "anonymity afforded by modern society." Recent Legislation, 108 Harv. L.Rev. 787, 790 (1995) (discussing the Washington state sex offender notification statute). Piercing the veil of modern anonymity may serve remedial purposes, such as alerting the community to the risk that a convicted sex offender who resides nearby may re-offend, but it also may serve punitive purposes, such as providing the community a target for harassment.

difference is that quarantine notices include health-related information; such notices make no mention of criminal or alleged criminal activity. Information provided pursuant to notification, then, links the registrant to some act for which he is blameworthy. Health related information is normally not related to culpability.

The state attempts to distinguish the notification provisions from the shaming punishments in terms of the scope of the notification. New Jersey makes much of the fact that the notification provisions, unlike the shaming punishments, do not involve the dissemination of information to the entire community. I believe that the state overstates the significance of this difference. Though notification under both Tier 2 and Tier 3 is intended to be limited, the design of the provisions seems to encourage more widespread dissemination. Tier 3 recipients are not warned that the information is confidential. Tier 2 recipients are so warned, but I fail to see how that warning is to be taken seriously. Under Tier 2, notification is given to the staff of organizations charged with the care or supervision of children and/or women. Such notification would effect the remedial purpose of the statute — the protection of the children and women under the care of the organizations — only if the organizations pass the notification information to the children and women under their care.

New Jersey also emphasizes that notification is tailored to the specific offender and may not occur at all. In emphasizing this aspect of notification, the state fails to appreciate fully the textured nuances of the shaming punishments. Shaming punishments were also tailored to the specific offender and often did not occur at all. For instance, permanent labeling and branding were reserved for offenders whose likelihood of re-offense was high. *See* Friedman, *supra* at 40. Only the "deep-

dyed sinner" would suffer such a fate. *Id.* Further, shaming punishments were by no means automatic; not all offenders would be so punished. Fines or bonds for good behavior (payments made to the authorities that were forfeited should the surety commit a misdeed within a certain time period) were common punishments for lesser offenses. *See* Hirsch, *supra* at 1224. And, even for more serious offenses, an offender could often simply pay a fine and avoid a shaming punishment altogether. *See* Friedman, *supra* at 38 (describing the punishment for a woman who struck her husband as either half an hour at a town meeting with her offense written on her forehead *or* the payment of a fine to the county).

5. Summary: Shaming Punishments as the Best Analogy

In sum, the foregoing analysis demonstrates that the closest historical analogues to the notification provisions of Megan's Law are the shaming punishments, which were traditionally considered punitive.[9] Like the shaming punishments, notification is carried out by the state. In that sense, notification is unlike measures in which the state merely allows private individuals or entities to access information and then allows those

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9. It is interesting to note that in recent years courts nationwide have returned to versions of the colonial shaming punishments. *See* Kahan, *supra,* at 631-34. Courts might require individuals to wear t-shirts or bracelets announcing their crime, to post placards on their houses or bumper stickers on their cars, to stand in public places wearing signs, or to apologize publicly to the community or their victims. *See id.* at 632-34. The actual, stated purpose of these measures is punitive; in that sense, they differ from Megan's Law. However, these measures suggest a shared cultural understanding, still prevalent in our society, that publicity concerning an individual's misdeeds can, and often is, intended to punish that individual.

individuals to release that information more broadly. Moreover, like the shaming punishments, notification provides the community with information about the registrant's identity and physical description, place of residence, place of employment, and criminal history. Such information is judicially endorsed. The information provided by notification is different from that provided by warning or wanted posters, which do not provide information about residence and employment, and quarantine notices, which do not provide information about criminal history; none of this information is judicially endorsed. Above all notification is the functional equivalent of shaming punishments; notification publishes information about the registrant calculated to reach the entire community and likely to lead to public opprobrium.

D. *Does the Text, Legislative History, or Design of the Notification Provisions Demonstrate That They are not Punitive?*

1. Introduction; The Role of Law Enforcement

Under *Artway,* the notification provisions must be considered punishment provided the text or legislative history does not demonstrate that they are not punitive. I therefore turn to the question whether the text or legislative history so demonstrates. This part of the analysis requires an examination of the actual operation or design of the measure at issue. *See Hendricks,* at __-__, 117 S.Ct. at __ (examining the design of the Kansas civil commitment statute). It is an inquiry focused on the question whether the legislature *designed* the statutory scheme in such a manner so as "to contradict the historical understanding of [the measure] as punishment." *Austin v. United States,* 509 U.S. 602, 619, 113 S.Ct. 2801, 2810, 125 L.Ed.2d 488 (1993).

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Perhaps the most striking feature of the statutory design is its placement of the tier classification determination and of the notification process squarely within the criminal justice system. The chapter that contains the registration and notification provisions is contained in the state's Code of Criminal Justice. *Cf. Hendricks,* at __, 117 S.Ct. at __ (relying in part on the decision by the state of Kansas to place its Sexually Violent Predator Act within the *probate* code, instead of the criminal code, to conclude that the challenged measure was not a criminal proceeding). It is the Attorney General of New Jersey, a law enforcement officer, who is charged with "promulgat[ing] guidelines and procedures for the notification required" by Megan's Law. N.J. Stat. Ann. § 2C:7-8(a) (1995).

The guidelines are to be formulated with the advice of a "notification advisory council" comprised, at least in part, of professionals from various fields outside of official law enforcement, but the professionals are all involved, at least to some degree, in the criminal justice system, broadly defined, and this council provides, as its name suggests, mere recommendations. *See id.* § 2C:7-11. Once in place, the guidelines are to be implemented by the county prosecutors: they determine the risk that a particular offender poses for re-offending, thereby setting the tier classification, and they determine the means of providing notification. *See id.* § 2C:7-8(d).

As the guidelines are currently written, the county prosecutors have significant leeway both in determining the appropriate tier classification and in fashioning the proper notification plan. Application of the Registrant Risk Assessment Scale is by no means ministerial; the county prosecutors must determine whether the particular offender poses a low, moderate,

or high risk to the community for each factor in the Scale. Although the Scale provides guidance to the prosecutors making this determination, it does not eliminate from the process prosecutorial evaluation. The guidelines allow prosecutors to enlist the assistance of persons outside the prosecutor's office, such as social workers or psychologists. However, the guidelines leave formulation of the notification to the considered judgment of the county prosecutors. It is up to those law enforcement officials to ensure that the notification is properly tailored to reach those at risk of being victimized by the particular offender.

Finally, law enforcement officers, whether of the municipality in which the offender intends to reside or of the state police force, provide the actual notification. *See id.* §§ 2C:7-6, 2C:7-7.

2. Promoting the Aims of Punishment

The operation of the statute will, moreover, promote "the traditional aims of punishment — retribution and deterrence." *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168, 83 S.Ct. 554, 567, 9 L.Ed.2d 644 (1963); *see Hendricks,* at __, 117 S.Ct. at __ ("As a threshold matter, commitment under the Act does not implicate either of the two primary objectives of criminal punishment — retribution or deterrence."). Of course, simply because a measure has the effect of promoting retribution and deterrence does not necessarily mean that its purpose was to do so. *See Artway,* 81 F.3d at 1255. Still, such an effect suggests that the particular measure was not *designed* in a way that contradicts the historical understanding of its analogues as punitive. That the notification provisions of Megan's Law promote retribution and deterrence is demonstrated as follows.

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By publicizing an offender's crime to the community, notification realizes justice, *see id.* (explaining that retribution "does not seek to affect future conduct or solve any problem except realizing 'justice' "), in that it inflicts suffering on the offender. It is undisputed that notification results in shaming the offender, thereby effecting some amount of retribution. This suffering "serves as a threat of negative repercussions [thereby] discourag[ing] people from engaging in certain behavior." *Id.* It is, therefore, also a deterrent. There is no disputing this deterrent signal; the notification provisions are triggered by behavior that is already a crime, suggesting that those who consider engaging in such behavior should beware. *See Doe v. Pataki,* 940 F.Supp. 603, 623 (S.D.N.Y.1996) ("The Act is designed in such a fashion as to suggest that it is punitive. It contains classic indicia of a punitive scheme. Its provisions are triggered by behavior that is 'already a crime.' ").

3. Excessiveness

The design inquiry is also furthered by an analysis of whether the notification provisions are excessive in relation to their stated remedial purpose. In a several important respects, they are. First, the criminal acts that, pursuant to Megan's Law, trigger registration and potentially subject an offender to notification, are over-broad. For example, kidnapping, even without a concomitant sexual offense, triggers notification, *see* N.J. Stat. Ann. § 2C:13-1(c)(2)(c); so, too, does consensual sexual contact that is criminalized merely because of the age of one of the participants, *see, e.g., id.* § 2C:14-2(a)(1), (b), (c)(5). *See Doe v. Pataki,* 940 F.Supp. at 623-24 (describing New York's Megan's Law as excessive because it covers individuals such as a "21-year old who engages in sexual intercourse with a 16-year old (who is not a spouse)," a person who engages in incest,

and a person who restrains another under the age of 17); *Kansas v. Myers*, 260 Kan. 669, 923 P.2d 1024, 1042-43 (1996) (describing Kansas's Megan's Law as excessive because "[s]everal of the listed felonies [triggering registration and notification] include what otherwise might be viewed as voluntary sexual contact between two persons that is considered criminal because of the minority status of the victim and the fact that the victim is not married to the accused").

Next, notification under Tier 3 is often provided to those who simply do not need to know that there is a released sex offender nearby. Tier 3 notification is to be provided to "members of the public likely to encounter the person registered." N.J. Stat. Ann. § 2C:7-8(c)(3) (1995). But the "likely to encounter" standard does not limit notification to vulnerable populations. It is a standard based largely on geographic proximity, *see Doe v. Poritz*, 142 N.J. 1, 662 A.2d 367, 385 (1995), rather than whether the recipient of notification needs protection (e.g., a child) or can protect others (e.g., a parent). Under the statute, a move by a registrant into a retirement community will trigger notification of his neighbors.[10]

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10. The guidelines written to implement Megan's Law may be interpreted to warn against this very problem. They suggest that the law enforcement officials responsible for implementing the notification tailor such notification so that it reaches only those at risk. However, the examples provided by the guidelines suggest limitations on the type of recipient organizations, not on recipient individuals. Moreover, the guidelines stress that, notwithstanding this suggested tailoring, geographic proximity remains the critical factor in determining the scope of notification. Additionally, once the information is released, there is no practical means of limiting its further distribution. *See Kansas v. Myers*, 260 Kan. 669, 923 P.2d 1024, 1041 (1996) ("The print or broadcast media could make it a practice of publishing the list [of released sex offenders] as often as they chose. Anyone could distribute leaflets containing the registered information anywhere and anytime.").

Similarly, the type of information required to be provided by the guidelines is excessive; it is information individual recipients often simply do not need to know. Individuals who receive notification learn of an offender's place of residence and his place of employment, regardless of their relative locations. If an offender does not work at a location near to his place of residence, which I suspect is not uncommon, then such information is only in part useful for protection. A recipient of notification who lives, attends school, works, or is otherwise located near to an offender's place of residence should be little concerned about he location of the offender's place of employment (and vice versa). Knowing the offender's place of residence might lessen the risk that the recipient will become a victim of the released offender; he or she can avoid the offender's house, for example. But, knowing the offender's distant place of employment offers no protective assistance to the recipient. If the person is not likely to encounter the offender at the offender's place of employment (or place of residence), why would he or she need or want to know such information?

4. Summary of "Design"

In sum, the design of the notification provisions does not contradict the historical understanding of analogues to such provisions as punitive. Notification is placed in New Jersey's criminal code and is structured and carried out by state law enforcement officials. Further, notification promotes the aims of retribution and deterrence. Finally, in important respects, notification is excessive. The particular recipients who receive notification and the type of information they receive are not carefully tailored to the remedial goals notification is intended to serve.

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E. *Notification Fails the History Subpart of* Artway

As the foregoing discussion makes clear, the proper historical analogues to the notification provisions of Megan's Law are the shaming punishments of colonial America. Clearly punitive, such punishments evidence an objective punitive purpose for the notification provisions. The design of the notification provisions — especially the placement of the provisions in the state criminal code and the placement of the responsibility of enforcing them with law enforcement officials, the excessiveness of their operation, and their promotion of retribution and deterrence — does not negate this objective punitive purpose. Therefore, I believe Megan's Law fails the history subpart of the second prong of the *Artway* test and should be considered punishment. As a result, the judgment of the district court should be reversed. This conclusion is buttressed by my discussion *infra* at Part II.C. of the extent to which, by reason of the network of Megan's Laws throughout the nation, notification is akin to banishment, another traditional colonial measure in the nature of punishment. *See supra,* at Part I.C.2.[11]

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11. Because of my conclusion as to the history subpart of the *Artway* test, I need not examine in detail the other subparts of the objective purpose prong of the test. I mention them here only briefly. First, though it is a very close question, I doubt that the notification provisions of Megan's Law, as I have described their design, can be explained solely by a remedial purpose. Second, because, as I have discussed, the traditional understanding of historical analogues to the notification provisions and the design of Megan's Law evidence an objective retributive purpose, the third subpart of the objective purpose prong is not implicated. In other words, the third subpart of the objective purpose prong applies only "if the legislature did not intend a law to be retributive but did intend it to serve some mixture of deterrent and salutary [remedial] purposes." *Artway,* 81 F.3d at 1263. Here, such a retributive purpose existed.

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II. EFFECTS

A. *Introduction*

The final prong of the *Artway* test concerns the actual effects of the challenged measure. According to *Artway*, "[i]f the negative repercussions — regardless of how they are justified — are great enough, the measure must be considered punishment." *Artway*, 81 F.3d at 1263.[12] The analysis required under this part of the test is one of degree, and is guided by the signposts of already decided cases. *See id.*

The conclusions I have already reached — that Megan's Law fails the objective purpose prong of the *Artway* test and must, therefore, be considered punitive — might make it unnecessary for me to reach the "effects" issue. However, because of the relevance of the effects to application of the clearest proof standard on which the majority relies, *see infra* Part III, because I believe that the majority's effects analysis is seriously flawed, and also because the enormous importance of the case counsels that I explain why, I discuss the effects of the notification provisions. As I will demonstrate, the majority, in undertaking its own analysis, narrows the test fashioned in *Artway*. It does so without support, and, given the tenor of the

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12. Holding that the retroactive cancellation of early release credits earned by prison inmates violated the Ex Post Facto Clause, the Supreme Court examined the actual effect of the legislation at issue without concern for the stated legislative purpose. *See Lynce v. Mathis*, 514 U.S. 499, 117 S.Ct. 891, 896-98, 137 L.Ed.2d 63 (1997). In so doing, the Court reaffirmed its approach in *California Department of Corrections v. Morales*, 514 U.S. 499, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995), on which *Artway* based the effects prong of its test. *See Lynce*, at __, 117 S.Ct. at 897.

analysis, unnecessarily. I also identify problems with its substantive discussion.

B. *Methodology: The Proper Standard for Evaluating Effects*

To begin, I quote from the majority's opinion: "It necessarily follows that some limit must be placed on the situations in which a measure's sting alone, despite its remedial purpose and effect, will constitute punishment under those clauses and that classification as punishment on the basis of sting alone must be reserved for cases involving deprivation of the interests most highly valued in our constitutional republic. . . . Interests such as these are sufficiently fundamental to our constitutionally secured liberty that state interference with them can be justified only by the most important of state interests." With the second sentence, the majority states that the line marking the boundary between a non-punitive and a punitive measure varies according to the remedial interest sought to be served by the measure. In other words, it appears that the majority is holding that the more important the remedial interest served by a particular measure the more harsh the sting of the measure's effects may be before the measure is classified as punitive. Nothing in *Artway* (or, for that matter, in the Supreme Court jurisprudence on which it draws) suggests such a formulation of the effects prong. To the contrary, *Artway* posits that a particular sting either falls on the punishment side of the line or it does not. At issue here is the particular sting, not the particular remedial interest.

The majority has thus introduced a difficult-to-apply sliding scale into an already complex test. This needless complication would render it nearly impossible to determine whether a particular sting is punishment. For example, as we know from

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Hawker v. People of State of New York, 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002 (1898), the revocation of a license to practice one's profession is not considered punishment. However, could such a revocation be punishment if the remedial interest served by the challenged measure is relatively unimportant? If so, at what point does the importance of the remedial interests render such a revocation non-punitive? Under the majority's reading of *Artway,* an analysis of the effects prong requires a two-track inquiry, guided only by a few fixed points. I fear that this amorphous inquiry might lead to an elusive or protean jurisprudence, something to be avoided.

Moreover, because the other prongs of the *Artway* test adequately stir into the mix the remedial interests served by the particular measure, we need not examine those interests under the effects prong. The actual purpose prong examines whether the legislature subjectively intended the measure to advance remedial interests. All three subparts of the objective purpose prong require the reviewing court, to some degree, to consider the remedial interests the legislature subjectively believed it was advancing by enacting the challenged measure. Considering the stated remedial purpose under the effects prong might overemphasize that stated purpose, thereby potentially allowing diversion of attention from the actual operation of the measure.

The majority also narrows the *Artway* test by requiring that, at a minimum, a challenged measure act to deprive affected persons of a *sufficiently fundamental interest* before that measure is considered to cause punitive effects. The majority offers no support for this proposition in either logic or precedent, and I am unaware of any. Nothing in *Artway* (or, for that matter, in the Supreme Court jurisprudence on which it draws) suggests such a formulation of the effects prong. In addition, at least as I

read the majority's opinion, defining the effects prong in this manner is unnecessary to the result. The majority apparently believes that the effects caused by notification simply are not harsh enough to classify Megan's Law as punitive. Under my reading of *Artway*, satisfaction of the effects prong does not require overcoming such a difficult hurdle.

I am especially concerned in this regard because of the indefiniteness of the majority's formulation. It is not apparent to me what would constitute a "sufficiently fundamental interest." Furthermore, without a clear understanding of those interests the deprivation of which might constitute punishment, I am also unsure as to whether the majority adequately defines the universe of interests that it, or I, would deem worthy of protection. In short, I fear that the majority might have left too little room to deal with unforeseen cases in this difficult area of jurisprudence.

In addition to re-formulating the *Artway* test, the majority also treats the effects of notification in such a manner as to minimize the impact of those effects. First, it emphasizes that the effects of which the offenders complain — e.g., isolation, public humiliation, loss of employment opportunities, and physical violence — are indirect. Although I agree that such is the case, I remonstrate against what seems to be overemphasis upon that aspect of notification for, in itself, indirectness of effects is not dispositive.

The Supreme Court addressed the question of directness in *California Department of Corrections v. Morales*, 514 U.S. 499, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995), the very case on which *Artway* bases the effects prong of its test. The Court struggled with the question whether a change in the procedures governing

parole suitability hearings would effect an impact on a prisoner's expected term of confinement. *See id.* at 506-14, 115 S.Ct. at 1602-05. In concluding that the measure did not constitute punishment, the Court determined that the changes in the relevant procedures "create[d] only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes." *Id.* at 509, 115 S.Ct. at 1603. The Court made plain, however, that even the indirect effects of a measure could render it punitive.

Here, the indirect effects of notification are neither "speculative" nor "attenuated." In fact, notification advances the stated remedial purposes of Megan's Law only insofar as it induces many of these indirect effects. For example, public safety is enhanced if potential victims of an offender are warned to avoid him, thereby isolating him from the larger community. If the legislature were not aware that at least partial isolation would necessarily result from notification, I doubt that it would have believed that notification would serve the remedial purposes it sought to advance. And, although not necessarily vital in ensuring the efficacy of Megan's Law, other indirect effects — e.g., harassment, loss of employment opportunities, and physical violence — surely were anticipated as also being inevitable. New Jersey was not the first state to adopt notification provisions, and the experiences of other states must have informed the New Jersey legislature as it considered Megan's Law.

In other states, notification has caused harassment, loss of job opportunities, and the like. A study by the Washington State Institute for Public Policy, released in December 1993 (approximately ten months prior to the enactment of Megan's Law), reported numerous instances of harassment following notification in Washington, some quite severe, under its 1990

Community Protection Act. *See* Sheila Donnelly & Roxanne Lieb, *Community Notification: A Survey of Law Enforcement* 7 (1993). In short, most of the indirect effects of notification are expected and foreseeable.

The second manner in which the majority minimizes the impact of the effects of notification is by separating the analysis into two distinct parts. It first examines the effect of notification on the reputational interests of the offender; then it examines the effect of notification on the increased risk of physical violence. The majority concludes that each of these effects, by itself, does not produce a sting harsh enough to classify notification as punishment. It fails, however, to determine whether these effects, if examined together, are sufficiently harsh. The difference between these two approaches is manifest. Individual effects each might produce only a moderate sting; adding together these little stings might, however, produce a great big sting. In the real world, it is the total sting that the recipient feels. It is not clear why the majority chose not to add these stings together. And, at least from my reading of *Artway*, there is no justification for choosing not to do so. Rather, I believe that *Artway* (and *Morales*) require an analysis of all the effects of a measure, provided they are not too speculative or attenuated, and here they are not.

C. *Actual Effects*

Turning from methodology to substance, I first note my agreement with the majority's identification of the effects caused by notification as including isolation, harassment, loss of employment and housing opportunities, damage to property, and physical violence.[13]

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13. I recognize that analysis of the notification provisions presents

(Cont'd)

Appendix B

As is clear from the majority's description of the effects of notification, the burden imposed by the collective weight of all of these effects is borne by the offender in all aspects of his life. At worst, the offender is literally cut off from any interaction with the wider community. He is unable to find work or a home, cannot socialize, and is subject to violence or at least the constant threat of violence. At best, he must labor within significant confinements. Although perhaps some people will hire him or rent him a home, his social intercourse with others is all but non-existent. The effects of notification permeate his entire existence. *See Doe v. Gregoire,* 960 F.Supp. 1478, 1486 (W.D.Wash.1997) ("[H]ere the punitive effects are dominant and inescapable."); *Roe v. Office of Adult Probation,* 938 F.Supp. 1080, 1092 (D.Conn.1996) ("Notification is an affirmative placement by the State of a form of public stigma on Roe, and this stigma by its very nature pervades into every aspect of an offender's life."). And, although the majority's opinion is eminently fair, I think that it understates the effects of notification provisions. Throughout the nation, there are continual reports of harassment, threats, isolation, and violence. In the margin, I mention some of the most recent occurrences.[14]

(Cont'd)

potentially difficult causation questions. For example, given that criminal history information is publicly available, it is not clear whether the harassment to which a released offender might be subject is caused by government notification or by the general availability of such information. It could well be that (and the record indicates instances in which) a community becomes aware of the presence of a released offender through the media. That said, the very fact that the state believes it important to notify persons about the location of a sex offender could both drive these media reports and spur local communities into action. In such event, notification could be characterized as a cause of these effects.

14. In California, where the information about released sex

(Cont'd)

Appendix B

Although the question is very close, I believe that there is a strong argument that the harshness of the effects of notification are closer to imprisonment and revocation of citizenship than to a loss of a profession or of benefits. Like imprisonment and the revocation of citizenship, notification is all-pervasive. In that sense, the offender has almost no refuge from the sometimes severe effects of notification. He may seek to move to another state, but the majority of states has some form of community notification. He could, perhaps, move out of the country to avoid this network of domestic Megan's Laws. At the extreme, then, notification has become, at least for that offender, akin to banishment. *See Doe v. Pataki,* 940 F.Supp. at 626 ("Notification statutes have resulted in the banishment of sex offenders both literally and psychologically."). This pervasive aspect of

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(Cont'd)

offenders can be accessed on CD-ROM, a released offender's car was fire-bombed. *See* Carolyne Zinko, *Flyers Falsely Call Artist a Molester,* S.F. Chron., July 14, 1997, at A1. Reaction to notification is often swift; another report from California notes that a neighborhood organized a protest within one day of receiving notification in order to drive the released offender from the community. *See* Bonnie Hayes & Frank Messina, *Few Turn Out for Megan's Law Viewing in O.C.,* L.A. Times, July 2, 1997, at A1. Further, the community reaction does not easily wane. In New York, two neighbors of a sex offender protested in front of his house for months in an effort to force him to leave. *See Today* (NBC television broadcast, June 24, 1997). Even those who have endeavored to help reintegrate released sex offenders into the community have been thwarted; in some areas, local churches have been unable to assist offenders because individual congregants have made it impossible for the offenders to stay in the flock. *See* Lisa Richardson, *Megan's Law is Put to Test as Towns Bounce Child Molesters,* L.A. Times, May 25, 1997, at A3. In fact, so potent a weapon is notification, that there are reports of false notifications, presumably initiated by private individuals intent on carrying out a personal vendetta. *See* Zinko, *supra,* at A1.

notification differentiates it from the loss of employment opportunities and the loss of benefits.[15]

Perhaps the most difficult question in this context is whether notification is fairly considered punishment when civil commitment — a form of involuntary confinement — is not. In *Hendricks* the Supreme Court held that a state statute allowing

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15. In both *De Veau v. Braisted*, 363 U.S. 144, 80 S.Ct. 1146, 4 L.Ed.2d 1109 (1960) (plurality opinion), and *Hawker v. People of State of New York*, 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002 (1898), the Supreme Court held that the loss of certain employment opportunities did not constitute punishment. However, the loss of such opportunities was limited; in *De Veau*, the relevant statute forbade a felon from work as a union official, *see De Veau*, 363 U.S. at 145, 80 S.Ct. at 1147, and in *Hawker*, the relevant statute forbade a felon from practicing medicine, *see Hawker*, 170 U.S. at 190, 18 S.Ct. at 574. In neither case did the statute limit all employment opportunities.

In *Flemming v. Nestor*, 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960), the Supreme Court held that the loss of social security benefits did not constitute punishment. In the context of the particular statute, however, the sting of that loss is not as sharp as might be supposed initially. First, the spouse of the beneficiary might still be eligible for benefits. *See id.* at 606 n. 2, 80 S.Ct. at 1370 n. 2. Second; the loss is triggered by deportation from the United States. *See id.* at 604-05 & n. 1, 80 S.Ct. at 1369-70 & n. 1. There is no indication whether the deportee might be eligible for similar benefits in the country to which he is deported. Thus, the loss of social security benefits in this context does not necessarily render the affected individual destitute or without assistance; he has other places to turn.

In a similar vein, we have recently held that the eviction of a tenant from public housing because of a drug offense is not punitive, *see Taylor v. Cisneros*, 102 F.3d 1334, 1341-1344 (3d Cir.1996), but such an eviction did not prevent the affected individual from obtaining housing elsewhere.

the confinement of convicted sex offenders after the expiration of their prison term did not constitute punishment. Important to the Court was the traditional understanding of civil commitment as non-punitive. But beyond that distinction, I note two respects in which notification under Megan's Law may be considered more harsh than the civil commitment statute at issue in *Hendricks*.

First, anyone confined under the Kansas statute was afforded some form of treatment if such was possible. *See Hendricks*, at __, 117 S.Ct. at __. No such treatment is available to those subject to notification under Megan's Law, and there is at least some evidence in the record that the isolation engendered by notification may in fact cause some offenders to recidivate. *See* Prentky Aff. ¶ 4, Appellants' App. at 189; *see also Doe v. Pataki*, 940 F.Supp. at 628. Thus, the effects of civil confinement might be rehabilitative, while those of notification are exactly the contrary. Second, the Kansas statute required a yearly reevaluation of the confined offender. *See Hendricks*, at __, 117 S.Ct. at __. The registration and notification provisions in Megan's Law are applicable for at least fifteen years. *See* N.J. Stat. Ann. § 2C:7-2(f) (1995). It is possible, then, that the sting of notification will last far longer than that of civil commitment.

D. *Summary*

In sum, although I do not rely on my analysis of the effects prong of the *Artway* test to support my ultimate conclusion, I note that the majority's discussion of effects is seriously flawed in terms of both procedure and substance, casting further doubt upon the judgment and shoring up still further my dissenting posture. The majority improperly and unnecessarily narrows the effects prong of *Artway* by requiring that a measure deprive an

individual of a constitutionally secured fundamental right and by examining the effects in isolated groupings. Finally, its substantive discussion of actual effects is, in important respects, flawed.

III. THE "CLEAREST PROOF" DOCTRINE

The majority's most serious challenge to my position inheres in its argument, citing *Hendricks* and referring to *Ursery,* that only the "clearest proof" will negate legislative intent to deem a measure non-punitive. In terms of the *Artway* test, then, the majority effectively holds that should a measure be considered non-punitive under the test's first (actual purpose) prong, then there is a strong presumption that the measure is non-punitive, and only the clearest proof as to the second (objective purpose) and third (effects) prongs of the test will overcome that presumption. I am unpersuaded. First, the etiology of the "clearest proof" doctrine is such that I doubt that the Supreme Court would apply it in this context with such clear and direct historical antecedents, so plainly punitive in character, to the community notification provisions of Megan's Law. Second, even if the standard were applied here, I believe that the historical context of notification, the design of Megan's Law, and the effects resulting therefrom, provide sufficiently clear proof of objective intent to negate remedial purpose.

The clearest proof standard was first articulated in *Flemming v. Nestor,* 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960). In *Flemming,* the Supreme Court addressed a contention that the legislative history and design of a statute that allowed the Secretary of Health, Education, and Welfare to terminate Social Security benefits payable to aliens deported due to their political affiliations evidenced a punitive congressional intent that negated a stated remedial intent. The Court stated:

> We observe initially that only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground. Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed. Moreover, the presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it.

Id. at 617, 80 S.Ct. at 1376.

The Court has since employed the clearest proof standard in at least six cases. In *Communist Party of the United States v. Subversive Activities Control Board,* 367 U.S. 1, 81 S.Ct. 1357, 6 L.Ed.2d 625 (1961), the Court considered whether, despite manifest congressional intent to the contrary, a measure was actually intended to outlaw the Communist Party. The Court stated that only the clearest proof would negate that congressional intent. In *United States v. Ward,* 448 U.S. 242, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980), the Court required the clearest proof that, despite the manifest intent to create a civil proceeding, a fine under the Federal Water Pollution Control Act was nevertheless a criminal proceeding. In *United States v. One Assortment of 89 Firearms,* 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984), and in *Ursery,* the Court applied the clearest proof standard to determine whether civil forfeiture statutes were punitive. Examining the Illinois Sexually Dangerous Persons Act, the Court in *Allen v. Illinois,* 478 U.S. 364, 106 S.Ct. 2988, 92 L.Ed.2d 296 (1986), stated that only the clearest proof would negate the legislative intent that proceedings determining whether an individual should be

committed to psychiatric care were civil in nature. Finally, and most recently, in *Hendricks,* the Court used the clearest proof standard in the context of a challenge to a civil commitment statute.

Although the Supreme Court has repeatedly applied the clearest proof standard in the context of challenges alleging that subjective legislative intent is different from objective legislative intent, I am unwilling to apply the clearest proof standard in this context, at least until the Supreme Court makes it clear that doing so is appropriate. The clearest proof standard creates a nearly irrebuttable presumption that favors subjective legislative intent over objective manifestations of that intent. In an excess of caution, I eschew exploration of the extent to which such a presumption can create incentives for legislatures to obscure their actual intent with subjective intent, rendering it unwise to employ it in certain circumstance. The purpose of the "clearest proof" exercise is to provide a technique to determine legislative intent. This technique is unnecessary here, where, as I have explained, notification measures are so plainly the direct descendants of historical punitive schemes. It seems to me, moreover, that something more than subjective intent alone must be shown to abrogate the historical understanding that notification measures are punitive. In other words, a legislature's simply denying that it is operating outside of a shared cultural tradition does not make it so.

This argument may be illuminated by flipping the coin over, as it were, and looking at the issue by assuming that the clearest proof standard applies in this case. In such event, I believe that such proof exists. At the threshold, I warn against placing too much emphasis on the meaning of "clearest proof." As *Flemming* and its progeny make patent, the standard is intended as a kind

of warning to the federal courts to give legislatures the benefit of the doubt. It is thus consistent with familiar canons of statutory interpretation and constitutional adjudication stating that legislatures are rational bodies that intend to function within their powers to enact lawful measures. In cases in which there is little doubt, however, there is no benefit to give.

Here, there is little doubt. As Part I.C. makes clear, notification measures have historically been considered punitive. As Part I.D. makes clear, the particular design of notification under Megan's Law in no way contradicts this history. And, as Part II makes clear, the effects of notification measures suggest strongly their punitive nature; the majority's efforts to dilute the *Artway* effects prong, *see supra* Part II, are unavailing. Taking the foregoing factors together, then, I conclude that sufficient proof of an objective punitive intent motivating the notification provisions of Megan's Law exists to negate the subjective remedial intent.

IV. CONCLUSION

We should and do endeavor mightily to protect our children from the dangers of the modern world. There is, however, a background risk of violence from which we simply cannot shield them. I believe that the New Jersey legislature desperately wanted to do all that it could to prevent the murder of any child at he hands of a released sex offender. But, if a released sex offender is intent on repeating his offense, there is no reason to believe he will necessarily limit himself to his surrounding community (or, for that matter, limit himself to his state).

Unfortunate though it may be, dangers to our children can come from anywhere. People in the community, especially

parents, therefore justifiably warn children more sternly about interacting with strangers, wandering too far from home, staying out past dark, etc. There is no way to determine how many crimes will be prevented by all of the Megan's Laws throughout the country. I suspect, however, that the change in protection secured by notification will be marginal at best. Query whether this marginal change is worth tampering with "an essential thread in the mantle of protection that the law affords the individual citizen." *Lynce v. Mathis*, __ U.S. __, __, 117 S.Ct. 891, 895, 137 L.Ed.2d 63 (1997) (discussing that group of constitutional provisions protecting against the retroactive application of new laws).

It is instructive to note that this issue bears a similarity to the challenge the Supreme Court recently faced in *Reno v. ACLU*, __ U.S. __, 117 S.Ct. 2329, __ L.Ed.2d __ (1997). There, underlying the Court's decision to strike down key provisions of a statute purporting to rid the Internet of obscenity is the notion that vital constitutional protections must not be swept away in the understandable fervor to protect our children. Basic constitutional rights fundamental to ordered liberty, like the freedom of speech and the right to be free from the retroactive application of the laws, impose on each of us certain burdens. We will remain a free people only so long as we accept those burdens, even in the face of the very safety of our children. Recognizing the rights of released sex offenders, unpalatable though that may be, is one of them.

Although I am outvoted on the double jeopardy/ex post facto issue, I am at least comforted by our holding that the notification machinery, with all of its attendant consequences, will not be triggered without the significant safeguard of requiring the state to establish the case for notification by clear and convincing evidence.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, DATED SEPTEMBER 17, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-5416

W.P., et al., Individually and as Representatives of a Class pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2),

Appellants

v.

PETER VERNIERO*, Attorney General of New Jersey; JEFFREY S. BLITZ, Atlantic County Prosecutor; CHARLES R. BUCKLEY, Acting Bergen County Prosecutor; STEPHEN G. RAYMOND, Burlington County Prosecutor; JOSEPH F. AUDINO, Acting Camden County Prosecutor; STEPHEN D. MOORE, Cape May County Prosecutor; NEIL S. COOPER, Acting Cumberland County Prosecutor; CLIFFORD J. MINOR, Essex County Prosecutor; HARRIS Y. COTTON, Gloucester County Prosecutor; CARMEN MESSANO, Hudson County Prosecutor; SHARON B. RANSAVAGE, Hunterdon County Prosecutor; MARYANN K. BIELAMOWICZ, Mercer County Prosecutor; ROBERT W. GLUCK, Middlesex County Prosecutor; JOHN KAYE, Monmouth County Prosecutor; W. MICHAEL MURPHY, JR., Morris County Prosecutor; DANIEL J. CARLUCCIO, Ocean County Prosecutor; RONALD S. FAVA, Passaic County Prosecutor; RONALD A. EPSTEIN, Salem County Prosecutor; MELAINE B. CAMPBELL, Acting Somerset County Prosecutor; DENNIS O'LEARY, Sussex County Prosecutor; EDWARD NEAFSEY, Acting Union County Prosecutor; JOHN J. O'REILLY, Warren County Prosecutor

(*Amended per Clerk's order of 7/15/96)

Appendix C

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil Action No. 95-cv-00098)

Argued October 21, 1996

BEFORE: BECKER, STAPLETON and NYGAARD, *Circuit Judges*

ORDER

It appearing that:

A. This court issued an injunction on July 9, 1996, pending final resolution of this appeal;

B. This court issued an opinion on August 20, 1997;

C. A motion was thereafter filed to vacate the injunction pending appeal to which appellants have filed a response; and

D. A motion for rehearing *en banc* was denied today;

Now, therefore, IT IS ORDERED that:

1. This court's injunction of July 9, 1996, will terminate without further action of this court on the earliest of the following dates: (1) 90 days from the date of the denial of the petition for rehearing by this court if a petition for certiorari and a motion for an injunction *pendente lite* has not then been filed with the Supreme Court of the United States; or (2) the date of the disposition by that court of the motion for an injunction *pendente lite* in the event such a motion and a petition for certiorari have been filed within such 90-day period.

Appendix C

2. After termination of the injunction of July 9, 1996, any plaintiff may apply to the district court for injunctive relief if he or she contends that he or she is being threatened with a process pursuant to the order of the Supreme Court of New Jersey entered September 10, 1997, in *In Re Matter Of Amendment To Procedure For Hearings On Objections To Megan's Law Tier 2 And Tier 3 Classification And Manner Of Notification Determination* inconsistent with the opinion of this court issued herein on August 20, 1997.

3. The order of the district court with respect to the sealing of the record of this case, as modified by subsequent orders of this court, will be continued in effect until modified or terminated by the district court.

By the Court,

s/ Walter K. Stapleton
Circuit Judge

DATED: SEP 17 1997

RG/CC: MZB RKC
JJG GSB
LSL FSH
JER WMK
GSL LS
TEB JDP
JLY

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING, DATED SEPTEMBER 17, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-5416

W.P., et al., Individually and as Representatives of a Class pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2),

Appellants

v.

PETER VERNIERO*, Attorney General of New Jersey; JEFFREY S. BLITZ, Atlantic County Prosecutor; CHARLES R. BUCKLEY, Acting Bergen County Prosecutor; STEPHEN G. RAYMOND, Burlington County Prosecutor; JOSEPH F. AUDINO, Acting Camden County Prosecutor; STEPHEN D. MOORE, Cape May County Prosecutor; NEIL S. COOPER, Acting Cumberland County Prosecutor; CLIFFORD J. MINOR, Essex County Prosecutor; HARRIS Y. COTTON, Gloucester County Prosecutor; CARMEN MESSANO, Hudson County Prosecutor; SHARON B. RANSAVAGE, Hunterdon County Prosecutor; MARYANN K. BIELAMOWICZ, Mercer County Prosecutor; ROBERT W. GLUCK, Middlesex County Prosecutor; JOHN KAYE, Monmouth County Prosecutor; W. MICHAEL MURPHY, JR., Morris County Prosecutor; DANIEL J. CARLUCCIO, Ocean County Prosecutor; RONALD S. FAVA, Passaic County Prosecutor; RONALD A. EPSTEIN, Salem County Prosecutor; MELAINE B. CAMPBELL, Acting Somerset County Prosecutor; DENNIS O'LEARY, Sussex County Prosecutor; EDWARD NEAFSEY, Acting Union County Prosecutor; JOHN J. O'REILLY, Warren County Prosecutor

(*Amended per Clerk's order of 7/15/96)

Appendix D

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and McKEE, *Circuit Judges*

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Becker would have granted rehearing.

By the Court,

s/ Walter Stapleton
Circuit Judge

Dated: SEP 17 1997

DR/cc: MZB RKC
JJG GSB
LSL FSH
JER WMK
GSL LS
TEB JDP
JLY

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, DATED SEPTEMBER 11, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 96-5132 and 96-5416

E. B., (A Fictitious Name)

v.

PETER VERNIERO*, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY; CHARLES R. BUCKLEY, ACTING BERGEN COUNTY PROSECUTOR; JAMES MOSLEY; CHIEF OF POLICE OF THE CITY OF ENGLEWOOD, NEW JERSEY

Peter Verniero*, Attorney General
Of The State Of New Jersey

Appellant in No. 96-5132

(*Amended per Clerk's Order of 7/16/96)

W. P., et al., Individually and as Representatives of a Class pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2)

v.

PETER VERNIERO*, Attorney General of New Jersey; JEFFREY S. BLITZ, Atlantic County Prosecutor; CHARLES R. BUCKLEY, Acting Bergen County Prosecutor; STEPHEN G. RAYMOND, Burlington County Prosecutor; JOSEPH F.

Appendix E

AUDINO, Acting Camden County Prosecutor; STEPHEN D. MOORE, Cape May County Prosecutor; NEIL S. COOPER, Acting Cumberland County Prosecutor; CLIFFORD J. MINOR, Essex County Prosecutor; HARRIS Y. COTTON, Gloucester County Prosecutor; CARMEN MESSANO, Hudson County Prosecutor; SHARON B. RANSAVAGE, Hunterdon County Prosecutor; MARYANN K. BIELAMOWICZ, Mercer County Prosecutor; ROBERT W. GLUCK, Middlesex County Prosecutor; JOHN KAYE, Monmouth County Prosecutor; W. MICHAEL MURPHY, JR., Morris County Prosecutor; DANIEL J. CARLUCCIO, Ocean County Prosecutor; RONALD S. FAVA, Passaic County Prosecutor; RONALD A. EPSTEIN, Salem County Prosecutor; MELAINE B. CAMPBELL, Acting Somerset County Prosecutor; DENNIS O'LEARY, Sussex County Prosecutor; EDWARD NEAFSEY, Acting Union County Prosecutor; JOHN J. O'REILLY, Warren County Prosecutor

W.P., et al., Individually and as Representatives of a Class pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2),

Appellants in No. 96-5416

(*Amended per Clerk's order of 7/15/96)

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil Action Nos. 95-cv-00098 and 96-cv-00130)

Argued October 21, 1996

BEFORE: BECKER, STAPLETON and NYGAARD,
Circuit Judges

Appendix E

ORDER

It appearing that portions of the pleadings, record and briefing in the above-entitled appeals having been sealed to protect the identities of parties, it is hereby ORDERED that the order sealing the records is lifted to the extent that the petition for rehearing and any subsequent order thereon be made available publicly.

By the Court,

s/ Walter Stapleton
Circuit Judge

DATED: SEP 11 1997

DW/CC: MZB GSB
JJG FSH
LSL WMK
JER GSL
RKC LS
TEB JDP
JLY

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, DATED JULY 25, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNDER SEAL

No. *96-5416*

W.P., et al., Appellants

v.

Peter Verniero, et al.

(District of NJ (Newark) D.C. Civil No. 96-cv-00097) (JWB)

Present: BECKER, STAPLETON, AND NYGAARD, *Circuit Judges.*

Motion by Appellee, Peter Verniero, to amend the sealing order entered by this Court on 7/9/96, with letter memorandum in support, and enclosing copy of this Court's order entered 7/9/96.

s/ Laura L. Davis
Laura L. Davis 597-5017
Case Manager

Case Argued 10/21/96.

ORDER

The foregoing *motion is granted.*

Appendix F

By the Court,

s/ R. Becker
Circuit Judge

Dated: JUL 31 1997

LD/cc: MZB RKC LS
JJG GSB TEB
LSL FSH JDP
JER WMK JLY

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, DATED JULY 5, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. *96-5416*

W.P., et, al., Appellants

v.

DEBORAH PORITZ, et al.

(DNJ-Newark D.C. No. 96-sc-97 (JWB))

Present: BECKER and ROTH, *Circuit Judges.*

1) Motion to stay order of district court and to continue an injunction during pendency of appeal, with brief and appendix in support

2) Appellees' response

3) Response of all County Prosecutor defendants, except Sussex County

4) Appellant's motion to file all papers in this matter under seal

5) Response of Sussex County

Appendix G

s/ Lenore R. Benoit
Lenore R. Benoit 597-1092
Deputy Clerk

Response due 7/8/96 by 5:00 pm.

ORDER

The foregoing motions are granted. After consultation with counsel, the Clerk shall expedite the appeal and fix a briefing schedule.

By the Court,

s/ R. Becker
Circuit Judge

Dated: JUL 09 1996

AWI/cc: JER MZB
JJG FSH
MZB JDP

APPENDIX H — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, DATED JULY 1, 1996

W.P., et al., Individually and as Representatives of a Class Pursuant to Fed.R.Civ.P. 23(a) and 23(b)(2), Plaintiffs,

v.

Deborah PORITZ, Attorney General of New Jersey; Jeffrey S. Blitz, Atlantic County Prosecutor; Charles R. Buckley, Acting Bergen County Prosecutor; Stephen G. Raymond, Burlington County Prosecutor; Joseph P. Audino, Acting Camden County Prosecutor; Stephen D. Moore, Cape May County Prosecutor; Neil S. Cooper, Acting Cumberland County Prosecutor; Clifford J. Minor, Essex County Prosecutor; Harris Y. Cotton, Gloucester County Prosecutor; Carmen Messano, Hudson County Prosecutor; Sharon B. Ransavage, Hunterdon County Prosecutor; Marryann K. Bielamowicz, Mercer County Prosecutor; Robert W. Gluck, Middlesex County Prosecutor; John Kaye, Monmouth County Prosecutor; W. Michael Murphy, Jr., Morris County Prosecutor; Daniel J. Carluccio, Ocean County Prosecutor; Ronald S. Fava, Passaic County Prosecutor; Ronald A. Epstein, Salem County Prosecutor; Melaine B. Campbell, Acting Somerset County Prosecutor; Dennis O'Leary, Sussex County Prosecutor; Edward Neafsey, Acting Union County Prosecutor; and John J. O'Reilly, Warren County Prosecutor, Defendants.

Civil Action No. 96-97.

United States District Court,
D. New Jersey.

July 1, 1996.

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* * *

BISSELL, District Judge.

In their Second Amended Complaint the plaintiffs in this class action assert that the New Jersey Registration and Community Notification Laws (hereinafter "Megan's Law") is unconstitutional as applied retroactively to the plaintiff class because it violates the *ex post facto* clause of the United States Constitution (Count II), its double jeopardy clause (Count III) and the procedural due process protections of the fourteenth amendment (Count IV). Count I sought a temporary restraining order and a preliminary injunction *pendente lite*. That relief has previously been granted as reflected in prior Opinions and Orders of this Court. Shortly after the filing of the Second Amended Complaint, this Court certified the following plaintiff class, constituting:

> All persons required to register as a sex offender pursuant to N.J.S.A. 2C:7-1 et seq. and whose offenses were committed prior to October 31, 1994, the effective date of the New Jersey Registration and Community Notification Laws, and who have been or will be classified as tier II or tier III offenders.

(Order, March 15, 1996).

Presently before the Court are plaintiffs' motion for summary judgment and defendant Deborah Poritz's motion for summary judgment on all Counts seeking final relief: Counts II, III and IV. All additional defendants, the county prosecutors, have joined in Attorney General Poritz's motion. Plaintiffs bring this action under 42 U.S.C. § 1983. This Court has jurisdiction

pursuant to 28 U.S.C. § 1331 and 1343(3). For the reasons set forth below, plaintiffs' motion is denied and defendants' motion is granted.

INTRODUCTION

Society's concern about sex offenders is an issue which is extremely important in modern society. The many efforts to address this issue have failed as often as they have succeeded. There is still much to be learned about the cause of these acts and how best to combat them.

The lack of societal success in this area is demonstrated nowhere more poignantly than in the death of seven-year-old Megan Kanka. The shock that the community would normally feel at the brutal death of a child was magnified tenfold by the fact that the alleged perpetrator was a twice-convicted sex offender. Thus, it is natural and appropriate that this incident would spur the public to demand quick and decisive actions on the part of its government to curtail such tragedies in the future.

However, government is at all times constrained by the limitations placed on it by the United States Constitution and the balancing of political and societal values contained on its pages. The rights which this Court examines today "are towering constitutional provisions of great importance to individual dignity, freedom, and liberty." *Doe v. Poritz*, 142 N.J. 1, 43, 662 A.2d 367 (1995).

It must be clearly and emphatically stated that what the Court here undertakes is not a balancing of the rights of sex offenders against the rights of their victims. Rather, it is an analysis of the breadth of the rights which *every* American holds,

and the constitutional limitations on a government's power to infringe them. When the government violates an individual's constitutional rights, regardless of the propriety of its motivation, it is this Court's duty, if requested, to identify and redress such a violation.

I. Megan's Law

In order to evaluate the statutes involved in this case it is necessary to review the circumstances that surrounded their passage. In the summer of 1994, seven-year-old Megan Kanka was abducted, molested and strangled near her home. (Cert. of Jane Grall, ¶ 2). The man accused of this reprehensible act, Jesse Timmendequas, was previously convicted of sex offenses involving young girls. (*id.*) The Kankas and many of the other neighborhood residents were unaware of the criminal history of Timmendequas and the other two convicted sex offenders with whom he lived. (*Id.*) Public reaction to this crime was intense and Governor Whitman and the State Legislature quickly responded to the clamor. Within one week of the discovery of Megan's body, both political branches had proposed extensive legislative and regulatory packages to address the issue. (*Id.*, ¶¶ 4-6).

Within a month, the first versions of the Community Registration and Notification laws passed the General Assembly and the Senate. (*Id.*, ¶¶ 13-15). In the General Assembly, the bills were declared "emergency" and therefore bypassed committee and were put to a vote the same day as the second reading. (*Id.*, ¶ 13). The bills were conferenced and amended, and ultimately were signed into law on October 31, 1994. (*Id.*, ¶¶ 13-19). The Registration and Notification statutes are two of ten statutes signed the same day which are collectively referred

to as "Megan's Law" in memory of Megan Kanka. (Defendant's Br. at 3).

Megan's Law requires a system of registration for sex offenders and other offenders who have committed crimes against children[1]. (*Id.*) Once the individual has registered, he is

1. The individuals required to register are defined as those persons with:

> (2) A conviction, adjudication of delinquency, or acquittal by reason of insanity for aggravated sexual assault; sexual assault; aggravated criminal sexual contact; kidnapping pursuant to paragraph (2) of subsection c. of N.J.S. 2C:13-1; endangering the welfare of a child by engaging in sexual conduct which would impair or debauch the morals of the child pursuant to subsection a. of N.J.S. 2C:24-4; endangering the welfare of a child pursuant to paragraph (4) of subsection b. of N.J.S. 2C:24-4; luring or enticing pursuant to section 1 of P.L.1993, c. 291 (C. 2C:13-6); criminal sexual contact pursuant to N.J.S. 2C:14-3b. If the victim is a minor; kidnapping pursuant to N.J.S. 2C:13-1, criminal restraint pursuant to N.J.S. 2C:13-2, or false imprisonment pursuant to N.J.S. 2C:13-3 if the victim is a minor and the offender is not the parent of the victim; or an attempt to commit any of these enumerated offenses if the conviction, adjudication of delinquency or acquittal by reason of insanity is entered on or after the effective date of this act or the offender is serving a sentence of incarceration, probation, parole or other form of community supervision as a result of the offense or is confined following acquittal by reason of insanity or as a result of civil commitment on the effective date of this act;

N.J.S.A. 2C:7-2(b)(2).

If the individual was not incarcerated, on probation, parole or other form of community supervision on the effective date of the statute, then registration is triggered by a finding by the original court of a pattern of repetitive, compulsive behavior. N.J.S.A. 2C:7-2(b)(1).

then placed into one of three Tiers based upon the risk of reoffense, Tier I (low risk), Tier II (moderate risk), and Tier III (high risk). N.J.S.A. 2C:7-8. These classifications are made by the county prosecutors utilizing a "Registrant Risk Assessment Scale" developed by the Attorney General. (*Id.* at 3). Based upon the Tier Classification, segments of the public are provided with information about the registrant: law enforcement for Tier I; law enforcement and certain community organizations for Tier II; law enforcement, community organizations, and individuals likely to encounter the registrant for Tier III. (*Id.*)

Shortly after its passage, Megan's Law was challenged in both the federal and state courts. The Supreme Court of New Jersey addressed the issue in *Doe v. Poritz*, 142 N.J. 1, 662 A.2d 367 (1995). The *Doe* Court upheld the statute against *ex post facto*, double jeopardy, equal protection, administrative procedure act, privacy and due process challenges. *See Doe*, 142 N.J. at 12, 662 A.2d 367. That Court, however, found the statute to be lacking in its original form, and crafted a procedure of judicial review which it felt would adequately protect the liberty interests involved. *Doe*, 142 N.J. at 28-40, 662 A.2d 367. This holding was later augmented by that Court through a judicial order of October 23, 1995 specifically outlining the procedure to be followed in such review.

(Appendix to Brief in Support of Plaintiffs' Motion for Summary Judgment (hereinafter "Plaintiffs' App.") at A-306-28). The *Doe v. Poritz* Court also limited the scope of notification under Tier II and Tier III to those organizations and persons "likely to encounter" the registrant. *Doe*, 142 N.J. at 35-38, 662 A.2d 367.

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II. Artway v. Attorney General

A. History

Prior to the Supreme Court of New Jersey's decision in *Doe*, the constitutionality of Megan's Law was addressed in this District in *Artway v. Attorney General*, 876 F.Supp. 666 (D.N.J.1995). Alexander Artway was found guilty of a sex offense and sentenced prior to the effective date of the statute. (*Id.* at 668). The trial judge found his conduct to be "characterized by a pattern of repetitive, compulsive behavior." (*Id.*) Prior to registration, Artway filed an action for a Declaratory Judgment to invalidate Megan's Law on the same grounds asserted by plaintiffs in the case at bar.

Judge Politan found the law to be violative of the *ex post facto* clause of Article I of the United States Constitution. In doing so, he applied the multifactor test enumerated by the Supreme Court in *Kennedy v. Mendoza- Martinez*, 372 U.S. 144, 168-69, 83 S.Ct. 554, 567-68, 9 L.Ed.2d 644 (1963). (*Artway*, 876 F.Supp. at 688-92). Specifically, the court upheld registration and Tier I notification, and struck down notification at Tiers II and III. *Id.* That decision was appealed.

While the *Artway* case was pending on appeal, and after the *Doe v. Poritz* decision, the Attorney General and the county prosecutors began to implement the revised procedures for registration and notification. As registrants began to receive notice, several of them, including the plaintiffs in the instant action, sought preliminary injunctive relief from several judges in this district. That relief was granted in all instances, in part due to the pendency of the *Artway* appeal which could have been dispositive of this litigation.

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Each of these actions was filed on an emergent basis, straining the court's resources. Therefore, on March 15, 1996, pursuant to the allegations of the Second Amended Complaint herein, a class action was certified describing the class as set forth above.

The preliminary injunction was scheduled to terminate "10 days after the Third Circuit has issued its opinion on the appeal of *Artway v. Attorney General et al.*, Docket Nos. 95-5195, 95-5157, 95-5194." The *Artway* decision was expected to be dispositive of the due process, double jeopardy, and *ex post facto* issues raised in connection with Megan's Law. However, the Third Circuit found that those claims as addressed to Tier II and Tier III designees were not ripe for review in that case. *Artway v. Attorney General*, 81 F.3d 1235, 1246-52 (3d Cir.1996). As a result, this Court extended its injunctive relief to allow the parties to address those issues through motion practice, for summary judgment or otherwise, if the claims of any of the present plaintiffs had ripened. (*See* Order of April 22, 1996). This Court now directly addresses the merits of plaintiffs' Constitutional claims.[2]

2. It is very important that one understands what this case is not about. Aside from their due process argument, plaintiffs do not seek to have Megan's Law declared unconstitutional *ad infinitum*, no matter to whom it might be applied. Nor could they; for the plaintiff class members are only those who committed enumerated offenses before that law's enactment. Obviously, only plaintiffs so situated could attack Megan's Law on *ex post facto* and double jeopardy grounds, the very issues in the case at bar. This suit, therefore, does *not* contest the application of Megan's Law to persons who committed the enumerated sex offenses *after* the effective date of that law. A ruling in favor of the plaintiffs would limit significantly the number of persons subject to Tier II and Tier III notifications for much of this decade. However, by the turn of the next century, such notifications will increase as newly-convicted offenders are released, no matter what this Court's ruling in the present suit.

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In considering its role in evaluating a statute such as Megan's Law, this Court draws upon the analysis of Justice Stein at the conclusion of his dissenting Opinion in *Doe v. Poritz.*

> "The Legislature's value judgment about these laws is entitled to great respect, but that judgment comprises only one part of the constitutional equation. The judiciary's task is to complete the equation by evaluating the legislative determination in the context of settled Constitutional principles. Those principles are neither negotiable nor flexible, their importance having been conclusively determined more than two hundred years ago by the founding fathers. In applying those principles, we must bear in mind their origins: "The constitutional prohibitions against the enactment of ex post facto laws and [double jeopardy] reflect a valid concern about the use of the political process to punish or characterize past conduct of private citizens." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 513, 109 S.Ct. 706, 732, 102 L.Ed.2d 854, 895 (1989) (Stevens, J., concurring). In addition, we are reminded that retroactive statutes raise particular concerns. The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals. As Justice Marshall observed in his opinion for the Court in *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1982), the *Ex Post Facto* Clause not only ensures that individuals have "fair warning" about the effect of criminal statutes, but also "restricts

> governmental power by restraining arbitrary and potentially vindictive legislation." *Id.*, at 28- 29, 101 S.Ct. 960, 963-64, 67 L.Ed.2d 17 (1994).
>
> The Constitution's prohibition against *ex post facto* laws reflects an enduring value that transcends the most pressing concerns of this or any day and age. Today, our concern is with prior sex offenders; in the 1950's the legislative concern focused on Communists; and in the 1860's Congress was determined to punish legislatively those who had supported the Confederacy. Future legislatures will doubtlessly find reasons to deal harshly with other groups that pose an apparent threat to the public safety.
>
> * * * * * *
>
> Despite the Legislature's understandable concern about the danger presented by prior sex offenders, the judicial role, mindful of the compelling pressures that led to the statute's enactment, is to test the statute on the basis of the Constitution's fundamental protection against punitive retroactive legislation."

Doe v. Poritz, 142 N.J. 1, 145-47, 662 A.2d 367 (1995).

However, this Court's analysis should not overlook present reality. Despite what "original intent" theorists would say, the United States Constitution is not mired in the life and times of the 1790's and earlier. The beauty of the Constitution is that it is a living document as applicable and vital in the 1990's as it was more than 200 years ago. The very exceptional men who drafted, debated and ratified the Constitution had the foresight

to craft a rather brief document enunciating general principles; a document which they hoped would endure for several centuries as our forebears set the course of this country upon the noble experiment of representative government for and by a free people. Accordingly, while this Court must consider history in reaching its current decision, it does not do so bottled up in the era of the 17th and 18th centuries. This Court agrees with Justice Stein that constitutional prohibitions against *ex post facto* laws and double jeopardy serve as an appropriate check upon legislative excesses. However, when evaluating the New Jersey Legislature's response to *bona fide* societal concerns of the 1990's, the Court will consider this reality and will afford to that legislature the "respect" to which its "value judgment[s]" are entitled. *Doe v. Poritz*, 142 N.J. at 145, 662 A.2d 367.

B. The Third Circuit Opinion

On appeal, the Third Circuit found that many of Mr. Artway's claims were not ripe because he had neither registered nor been classified by the appropriate county prosecutor's office. *Artway*, 81 F.3d at 1250. The court held that an individual must be more fully involved with the statutory scheme through registration and initial classification. (*Id.*) However, it was not deemed necessary for an individual to have undergone actual notification before the challenge could be levied. *Artway*, 81 F.3d at 1250 n. 9.

The Third Circuit did find that Artway's challenges to registration and Tier I notification were ripe, and affirmed the district court's decision holding them to be constitutional. (*Id.* at 1271). The Third Circuit also conducted an exhaustive review of Supreme Court precedent and then articulated a "synthesis" of those decisions applicable to *ex post facto* and double

jeopardy, upon which it formulated a test for determining when an act constitutes "punishment" under those provisions. (*Id.* at 1253-63). Although the issues regarding Tiers II and III were not ripe, the Court applied this test to both registration and Tier I. This highly structured formula was stated as follows:

> A measure must pass a three-prong analysis—(1) actual purpose, (2) objective purpose, and (3) effect—to constitute non-punishment. We must look at actual purpose to see "whether the legislative aim was to punish." *See De Veau* [*v. Braisted*, 363 U.S. 144, 160, 80 S.Ct. 1146, 1155, 4 L.Ed.2d 1109 (1960)]. If the legislature intended Megan's Law to be "punishment," i.e., retribution was one of its actual purposes, then it must fail constitutional scrutiny. If, on the other hand, "the restriction of the individual comes about as a relevant incident to a regulation," the measure will pass this first prong. Id.
>
> If the legislature's actual purpose does not appear to be to punish, we look next to its "objective" purpose. This prong, in turn, has three subparts. First, can the law be explained solely by a remedial purpose? *See Halper*, 490 U.S. at 448, 109 S.Ct. at 1901-02. If not, it is "punishment." Second, even if some remedial purpose can fully explain the measure, does a historical analysis show that the measure has traditionally been regarded as punishment? *See Austin*, 509 U.S. [602] at 610-12, 113 S.Ct. [2801] at 2806. If so, and if the text or legislative history does not demonstrate that this measure is not punitive, it must be considered "punishment." Third, if the legislature did not intend a law to be retributive but did intend it to serve some

> mixture of deterrent and salutary purposes, we must determine (1) whether historically the deterrent purpose of such a law is a necessary complement to its salutary operation and (2) whether the measure under consideration operates in its "usual" manner, consistent with its historically mixed purposes. *See Kurth Ranch*, 511 U.S. at __ - __, 114 S.Ct. at 1946-48. Unless the partially deterrent measure meets both of these criteria, it is "punishment." If the measure meets both of these criteria and the deterrent purpose does not overwhelm the salutary purpose, it is permissible under Kurth Ranch.
>
> Finally, if the purpose tests are satisfied, we must then turn to the effects of the measure. If the negative repercussions—regardless of how they are justified—are great enough, the measure must be considered punishment. *See Morales*, 514 U.S. at __, 115 S.Ct. at 1603. This inquiry, guided by the facts of decided cases, is necessarily one "of degree." *See id.*

Artway, 81 F.3d at 1263.

III. United States v. Usery

Poised to apply the *Artway* formula, this Court on June 24, 1996 received the United States Supreme Court's opinion in *United States v. Ursery*, __ U.S. __, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996), which alters the analysis to be employed in the case at bar.

Ursery involved two separate double jeopardy challenges to civil forfeiture statutes, 21 U.S.C. § 881(a)(6) and 21 U.S.C. § 881(a)(7). (*Ursery* at __ - __, 116 S.Ct. at 2138-40). In a case coming from the Sixth Circuit, civil forfeiture proceedings were

instituted against Guy Ursery's home, and following the resolution of that action he was indicted for manufacturing marijuana. (*Id.* at __, 116 S.Ct. at 2138-39). In a companion case from the Ninth Circuit [*U.S. v. $405,089.23*, 33 F.3d 1210 (9th Cir.1994)], the civil forfeiture action was instituted following the criminal conviction of petitioners Alt and Wren. (*Id.*) Both the Sixth and Ninth Circuits found the second proceeding to be unconstitutional and violative of the Double Jeopardy Clause. (*Id.*) The Supreme Court reversed. (*Id.*)

The Courts of Appeals based their decisions largely on the holding in *Austin v. United States*, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), which they believed stood for the proposition that all *in rem* civil forfeitures under 21 U.S.C. § 881 were "punishment" for the purposes of Double Jeopardy. *See United States v. Ursery*, 59 F.3d 568, 572-73 (6th Cir.1995); *United States v. $405,089.23 U.S. Currency*, 33 F.3d 1210, 1219-22 (9th Cir.1994).

The Supreme Court rejected this contention, stating the "holding of *Austin* was limited to the Excessive Fines Clause of the eighth amendment, and we decline to import the analysis of *Austin* into our double jeopardy jurisprudence." (*Ursery* at __, 116 S.Ct. at 2146-47). Furthermore, in footnote 2 of the majority Opinion, the Supreme Court limits the applicability of *Halper*, confining it to a much narrower scope than that suggested by Justice Stevens' dissent in *Ursery* and employed by the Third Circuit in *Artway*. (*Ursery* at __, 116 S.Ct. at 2144-45). The Court went on to say that "nothing in *Halper*,[3] *Kurth Ranch*,[4] or

3. *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989).

4. *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994).

Austin, purported to replace our traditional understanding that civil forfeiture does not constitute punishment for the purpose of the Double Jeopardy Clause. . . . None of those cases dealt with the subject of this case: *in rem* civil forfeitures for the purpose of the Double Jeopardy Clause." (*Ursery* at __, 116 S.Ct. at 2146). Instead, the Supreme Court based its analysis on a line of cases dealing with civil forfeiture, *Waterloo Distilling Corporation et al. v. United States; Various Items of Personal Property*, 282 U.S. 577, 51 S.Ct. 282, 75 L.Ed. 558 (1931); *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 93 S.Ct. 489, 34 L.Ed.2d 438 (1972); and *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984). (*Ursery*, at __, 116 S.Ct. at 2146-49).

This Court recognizes that it is bound by whatever Third Circuit precedent governs its inquiry. It may neither ignore nor reject such precedent. In the case at bar, however, the particular, compartmentalized approach of *Artway* need not and should not be followed, because it is not binding precedent for the issues and claims presented in the cross-motions for summary judgment.

First, and least significant to the analysis of *Artway*'s precedential value, is the fact that the claims in *Artway* attacking Tiers II and III were specifically found to be not ripe for adjudication. If this were all, the Court would apply the structured *Artway* pattern because it was both enunciated and then applied to the registration and Tier I notification features of Megan's Law; but there is more.

Secondly, *Artway* itself recognized the limitations of its own conclusions:

> We have thus attempted to harmonize a body of doctrine that has caused much disagreement in the

> federal and state courts. We realize, however, that our synthesis is by no means perfect. Only the Supreme Court knows where all the pieces belong. The Court will, we hope, provide more guidance with its decision in *United States v. $405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir.1994), amended on denial of rehearing, 56 F.3d 41 (1995), cert. granted, __ U.S. __, 116 S.Ct. 762, 133 L.Ed.2d 707 (1996), or some other case in the near future. With this qualification in mind, we turn to the application of this test to Megan's Law.

81 F.3d at 1263.

Through *Ursery* (the same case noted above by the Third Circuit), the U.S. Supreme Court has now spoken, and has presented a different approach to the issues which were then before *Artway* and are now before this Court.

Thirdly, *Ursery* expressly rejects the philosophical foundation of *Artway*: that a universal rule for the definition of "punishment" can and should be derived through a "synthesis" achieved from analyzing the Supreme Court's recent decisions in *Halper*, *Austin*, *Kurth Ranch* and *Morales*.[5] Not only is that evident from Justice Rehnquist's Opinion itself, it is highlighted by a comparison of that Opinion with the global (*Artway*) approach advocated by Justice Stevens in his dissent. *Artway*'s synthesis does not survive *Ursery*, a ruling by the highest court of the land, which this Court must follow.[6]

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5. *California Dept. of Corrections v. Morales*, __ U.S. __, 514 U.S. 499, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995).

6. Plaintiffs argue that this Court must apply *Artway*'s analytical pattern and wait for the Third Circuit to decide the impact of *Ursery* upon it. For the reasons set forth above, this Court disagrees. Relatedly, (Cont'd)

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The Supreme Court has now stated that *Halper*, *Austin*, *Kurth Ranch*, (by implication *Morales*), and now *Ursery* cannot be employed to establish a "synthesis" that generates a universal analytical framework for defining "punishment" in all cases.[7] That determination does not, however, require this Court to relegate each of those cases to a narrow context and thereafter decline to consult them for guidance in deciding the case at bar. Certain considerations common to those cases counsel this Court to employ them in deciding whether the Tier II and/or Tier III notification provisions of Megan's Law impose "punishment." These common considerations are the expressed intent of the legislature as reflected in the legislation itself and the legislative history; the "purpose" of that legislation, viewed objectively, particularly if that demonstrates a potential for a more punitive objective; a balancing of remedial and punitive goals; an analysis of how such laws have been considered historically, if there is any clear historical analogue; and a review of the "effect" of such legislation, if that effect is extreme or severe. Not surprisingly, each of those considerations was recognized in *Artway*. What *Ursery* teaches us, however, is that such considerations may not be transformed into a rigid series of hurdles which must be surmounted, one after the other, before the legislation can survive an *ex post facto* or double jeopardy challenge. Rather this Court, in an analysis similar to that in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963) (although the factors considered are not

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(Cont'd)
plaintiffs assert that this Court should not speculate how the Third Circuit would treat *Ursery* and then proceed to rule based on such speculation. However, that is not what this Court is doing; it is making its own determination of the significance of the *Ursery* decision and applying that determination here.

7. As to *Halper*, this result was foreshadowed by Judge Shadur's concurring Opinion in *Artway*. 81 F.3d at 1271-73.

identical), must weigh these considerations in a less structured fashion to reach its decision. *Ursery* also instructs this Court to focus primarily upon precedent most closely resembling the facts, issues and constitutional provisions involved in the case at bar.

Employing the analysis set forth above, this Court holds that Tier II and Tier III notifications applied to members of the plaintiff class do not violate their rights under the *ex post facto* and double jeopardy clauses.

IV. Summary Judgment

Federal Rule of Civil Procedure 56(c) provides that summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir.) (*en banc*), *cert. dismissed*, 483 U.S. 1052, 108 S.Ct. 26, 97 L.Ed.2d 815 (1987). In deciding a motion for summary judgment, a court must view the facts in the light most favorable to the nonmoving party and must resolve any reasonable doubt as to the existence of a genuine issue of fact against the moving party. *Continental Insurance Co. v. Bodie*, 682 F.2d 436, 438 (3d Cir.1982). The moving party has the burden of establishing that there exists no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The Supreme Court has stated that, in applying the criteria for granting summary judgment,

> the judge must ask . . . not whether . . . the evidence

> unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented. The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the [non-movant] is entitled to a verdict. . . .

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986). A fact is "material" only if it will affect the outcome of a lawsuit under the applicable law, and a dispute over a material fact is "genuine" if the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party. (*Id.*)

In order to survive a motion for summary judgment, a plaintiff must present "more than a mere scintilla of evidence" in his favor. He cannot simply reallege factually unsupported allegations contained in his pleadings. *Anderson v. Liberty Lobby*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986); *see also Maguire v. Hughes Aircraft Corp.*, 912 F.2d 67, 72 (3d Cir.1990). Only evidence that would be admissible at trial may be used to test a summary judgment motion. Evidence with a deficient foundation must be excluded from consideration. *Williams v. Borough of West Chester, PA*, 891 F.2d 458, 466 (3d Cir.1989); *see also Trap Rock Indus., Inc. v. Local 825, Int'l Union of Operating Eng'rs*, 982 F.2d 884, 890-91 (3d Cir.1992).

There is no dispute as to the material facts in this case. Any factual disagreement lies in the area of which facts are relevant

to the Court's analysis. The case is therefore amenable to summary judgment.

V. Ripeness

Article III's case or controversy mandate requires that a party suffer actual injury or be in imminent danger of doing so, before a statute may be challenged. *Artway*, 81 F.3d at 1246. This ripeness requirement prevents a court from becoming entangled in abstract disagreements. (Id.) In determining whether an issue is ripe for adjudication, two factors must be considered: "(1) the hardship to the parties of withholding court consideration; and (2) the fitness of the issues for judicial review." *Artway*, 81 F.3d at 1247 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 1515-16, 18 L.Ed.2d 681 (1967)).

The hardship prong dictates that the threat be " 'credible' and not merely 'speculative.' " (*Id.*) "When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 2309, 60 L.Ed.2d 895 (1979) (quoting *Doe v. Bolton*, 410 U.S. 179, 188, 93 S.Ct. 739, 745, 35 L.Ed.2d 201 (1973)).[8]

The threat of the application of Megan's Law to the class members is certainly credible under this standard. Artway's claims were unripe because he had neither registered nor been

8. The present classification and notification hearings are not criminal proceedings; however, the standard for ripeness enunciated in *Babbitt* is equally applicable to non-criminal proceedings.

classified in a given Tier. *Artway*, 81 F.3d at 1248. By contrast, individuals do not become members of the class until they have registered and county prosecutors have made and noticed an initial Tier II or III designation. At this point, unless the registrant takes affirmative action for review, notification at a specified level is a foregone conclusion.

The second prong of the test is whether the issues have been sufficiently explicated to provide for judicial review. (*Id.* at 1249). The voluminous submissions to the Court by all parties, including copies of the Registrant Risk Assessment Scale forms, Superior Court orders, legislative history, affidavits, newspaper articles, and expert reports provide more than adequate factual underpinning for this Court's analysis. Furthermore, the "district court enjoys flexibility to collect appropriate evidence so that the issue may be fit for judicial review." (*Id.* at 1250 n. 9).[9] The plaintiffs' claims are ripe for this Court's review.

VI. Ex Post Facto and Double Jeopardy

Article I, § 10 of the United States Constitution prohibits the passage of *ex post facto* laws[10]. U.S. Const. art. I, § 10. This limitation on the power of the legislature was forged out of the experiences of the Constitution's drafters under the Parliament of Great Britain which had the authority to pass such laws. *See Calder v. Bull*, 3 U.S. (3 Dall.) 386, 389, 1 L.Ed. 648 (1798). The *ex post facto* clause was adopted because "the framers of

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9. The Third Circuit panel was aware of the instant action when it provided this guidance in footnote 9 of its Opinion.

10. An *ex post facto* law is defined as "a law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed." Blacks Law Dictionary, 580 (West Sixth Ed.1990) (citations omitted).

the Constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment, . . . the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed." *Cummings v. Missouri*, 71 U.S. (4 Wall) 277, 322, 18 L.Ed. 356 (1867); *see also Calder*, 3 U.S. at 389, 1 L.Ed. 648 ("With very few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment, and vindictive malice.")

As the Supreme Court so aptly stated in *Beazell v. Ohio*, 269 U.S. 167, 169-70, 46 S.Ct. 68, 68, 70 L.Ed. 216 (1925):

> It is settled, by decisions of this court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.

It is without dispute that Megan's Law applies to acts committed prior to its effective date, therefore this Court must address the "more burdensome . . . punishment" prong to determine if there is an *ex post facto* violation. *See, e.g.* N.J.S.A. 2C:7-2(b)(1).

Similarly, the double jeopardy clause "prohibits governments from punishing citizens a second time for the same offense for which they had previously been punished." *Artway*, 876 F.Supp. at 685. Specifically, it states: "nor shall any person be subject for the same offense to be twice put to jeopardy of

life or limb." U.S. Const. amend. V. This prohibition applies equally to "a second prosecution for the same offense after conviction . . . and multiple punishments for the same offense." *United States v. Halper*, 490 U.S. 435, 440, 109 S.Ct. 1892, 1897, 104 L.Ed.2d 487 (1989). Each of the class plaintiffs has been previously convicted of a sex related or other offense which makes him subject to Megan's Law, and triggers this secondary requirement.

Thus under both the *ex post facto* and Double Jeopardy Clauses, "[t]he threshold question . . . is whether the [notification] provisions of Megan's Law impose 'punishment.' "*Artway*, 81 F.3d at 1253. If Tier II and Tier III notification does not constitute punishment, then there can be no violation of either clause; if it does, then both would be violated in the case at bar. (*Id.*)

VII. Punishment

A. Scope of Impact

Central to the analysis of Megan's Law is the scope of the impact that can be attributed to the legislation. There have been a few highly publicized incidents of vigilantism involving assault, arson, and death threats against sex offenders following notification.[11] However these criminal acts cannot be included within the statutory bounds of Megan's Law. The state and

11. In Washington, the home of Joseph Gallardo was burned down following community notification. *See* Jim Hooker, *Megan's Law Has a Harsh Prototype, The Record*, Northern New Jersey, Oct. 10, 1994. In New Jersey, Thomas Vicari was attacked and beaten by two men who mistakenly believed him to be the sex offender who resided at that address. *See* "Sex Offender Targeted in Home Attack," *The Express-Times*, January 10, 1995.

county prosecutors make it clear that such actions will be prosecuted, and appear to be doing so. Indeed the notifications to organizations and the community address that prospect specifically. For example, the notifications sent out in Union, Warren, Cape May, Hunterdon, Mercer, Morris and Ocean Counties state:

> Any action taken by you against this individual, including vandalism of property, verbal or written threats of harm or physical assault against this person, his family or employer will result in your arrest and prosecution for criminal acts.

Middlesex County uses that language for Tier III notifications. Some other counties have drafted similar language themselves, such as Sussex County:

> . . . law enforcement will carefully investigate all allegations of harassment and other criminal or disorderly conduct taken by a person against a registrant, the registrant's family, or the registrant's employer and that law enforcement will vigorously prosecute where appropriate.

On the other hand, the impact of Megan's Law cannot be limited to the act of notification itself. Defendants argue that the purpose of the statute is " 'to enable the public to protect itself from the danger posed by sex offenders' " (Defendant's Br. at 12 (quoting *Doe*, 142 N.J. at 73, 662 A.2d 367)). Therefore, members of the public must take some action to protect themselves from this identified threat if this goal of the statute is to be achieved. It cannot seriously be argued that the legislature intended or expected that people would continue their behavior unmodified after receiving notification.

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The acts which members of the public might take following notification include all *legal* actions, such as warning their children, limiting or eliminating contact with the registrant, refusing to do business with the registrant's employer, refusing to work with a registrant, legal eviction, and others. It would also include direct actions against the registrant that do not rise to the level of criminality such as picketing or boycotting businesses, name calling, ostracism of family members, discussion in the community, newspaper articles, discussion on radio talk shows, further dissemination of notice to the community, refusal to hire, and refusal to purchase property from registrant. Such actions are presented in the record developed for the cross- motions. They must, to some degree, be considered the natural and anticipated outgrowth of the legislation and implementing regulations.

Defendants further argue that the notification at Tier II should be distinguished due to its limited scope and distribution. However, as a practical matter, this Court does not find an appreciable difference between the two Tiers. Tier II notice is available to many organizations in a community, and to many people in those organizations. Although the initial distribution is limited in scope, "Tier Two notification can easily amount to the same notification as required for Tier Three" without appropriate safeguards. *Doe*, 142 N.J. at 35, 662 A.2d 367.

At present the organizations that are eligible to receive Tier II notification include those "that conduct activities involving the care and/or supervision of children such as community CrimeWatch programs, Big Brothers and Big Sisters, Girl and Boy Scouts, . . . parent-teacher organizations . . . , battered women's organizations, rape victim support groups and women's advocacy groups" if they request it. (Megan's Law A Guide for Community Organizations, Schools and Day Care Centers, at A-333). Schools, licensed day

care centers and summer camps will automatically receive notification. (*Id.*)

Once the information has been received, it is intended to be distributed to the staff with instructions to maintain confidentiality. While the Court will not assume that conscientious persons would willfully violate instructions regarding confidentiality, human nature being what it is, it is doubtful that Tier II confidentiality will always be preserved.[12] That is not to equate such breaches with "punishment," however. That consideration will be addressed hereafter. The case of *E.B.* provides a concrete example of what can occur when the confines of the dissemination of notice are breached. The plaintiff in that case was identified using fictitious initials; however, utilizing information about the registrant which was disclosed in open court and in newspaper accounts, the Guardian Angels organized a manhunt for the identity of E.B. Ultimately, Mr. Harold Turner discovered E.B.'s identity and disclosed it on a local radio talk show. (A-114-26).[13]

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12. However, violations of the realm to which notification should be confined are neither promoted nor ordered by state authorities and courts. One jurist, the Honorable Peter Ciolino, AJSC, Bergen County, has included in his Orders a warning of contempt sanctions against those who improperly disseminate Tier II information. Because Judge Ciolino is the state-wide coordinator for classification/notification proceedings in the Superior Court, Law Division, one can properly infer 1that the judges assigned in other counties are aware of and would soon follow his example when the present preliminary injunction is lifted.

13. Defendants argue, somewhat persuasively, that such actions will diminish significantly when Megan's Law is implemented, particularly as time passes and the police forces and community organizations receiving notification become more knowledgeable about their obligations. One would hope so. Private witch hunts and self-promotional demagoguery at another's expense have no place in the administration of Megan's Law.

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B. Expressed Legislative Purpose or Intent

The first factor which this Court addresses in its "punishment" inquiry is the subjective or actual intent of the legislature in passing the statute. (*Artway*, 81 F.3d at 1254-56; *see also De Veau v. Braisted*, 363 U.S. 144, 80 S.Ct. 1146, 4 L.Ed.2d 1109 (1960)). There is little evidence of the legislative intent, but that which does exist supports a remedial purpose for the statute. The statement of purpose in the statute reads:

> The Legislature finds and declares:
>
> > a. The danger of recidivism posed by sex offenders and offenders who commit other predatory acts against children, and the dangers posed by persons who prey on others as a result of mental illness, require a system of registration that will permit law enforcement officials to identify and alert the public when necessary for the public safety.
> >
> > b. A system of registration of sex offenders and offenders who commit other predatory acts against children will provide law enforcement with additional information critical to preventing and promptly resolving incidents involving sexual abuse and missing persons.

N.J.S.A. 2C:7-1. Similar sentiments were also part of the bill as introduced to the Senate. *See Artway*, 81 F.3d at 1264. The Court also determines that such actual legislative intent prompted the law's provisions on notification as well as registration.

The general dearth of legislative history is due to the manner

in which the legislation was rushed to the floor without committee referral or debate. (*Id.*; *see also* Grall Cert., ¶ 13). However, at this stage of the analysis, the stated purpose is sufficient to establish the subjective intent of the New Jersey Legislature.[14]

C. Objective Purpose

The next stage in the analysis is to examine the objective purpose of the statute to see if it arose out of the "sudden and strong passions" which the *ex post facto* clause is designed to combat. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137-38, 3 L.Ed. 162 (1810). The Court will here examine the remedial purposes presented, any punitive goals necessarily implicated and whether, if the statute has mixed objectives, the deterrent purpose is a usual and necessary complement to the salutary one. *Artway*, 81 F.3d at 1263.

1. Remedial Purpose

Artway is helpful here, even though its rigid format, with successive hurdles to sustain the law, is inconsistent with *Ursery*. In the words of *Artway*,

> The threshold question is thus whether a remedial purpose can explain the sanction. Only if the remedial purpose is insufficient to justify the measure, and one must resort also to retributive or deterrent justifications, does the measure become punitive. Only

14. Although it may be appropriate to look beyond the stated legislative intent in determining the actual purpose of the statute, to do so in this instance would merely serve to duplicate the objective purpose inquiry, *infra*.

> then can the measure "*only* be explained as also serving either retributive or deterrent purposes."

(*Id.* at 1255) (emphasis in original). The *Artway* court defined some of the significant terms in this part of the analysis as follows:

> Because *Halper* occupies such a central role in the punishment inquiry, a number of explanatory observations are in order. The first is a matter of semantics: a clear understanding of the terms "retributive," "deterrent," and "remedial" is critical to applying the *Halper* test. We therefore explain how we think the Supreme Court is using them. Retribution is vengeance for its own sake. It does not seek to affect future conduct or solve any problem except realizing "justice." Deterrent measures serve as a threat of negative repercussions to discourage people from engaging in certain behavior. Remedial measures, on the other hand, seek to solve a problem, for instance by removing the likely perpetrators of future corruption instead of threatening them (*De Veau*), or compensating the government for costs incurred (*Halper*).[15]

(*Id.* at 1255). Under *Ursery*, deterrence is not synonymous with punishment:

> Third, though both statutes may fairly be said to serve the purpose of deterrence, we long have held that this purpose may serve civil as well as criminal goals. . . . We recently reaffirmed this conclusion in *Bennis v.*

15. *Ursery*'s limitations on the use of *Halper* do not affect the validity of these definitions.

> *Michigan, supra* [516 U.S. __], at __, 116 S.Ct. [994] at 1000 [134 L.Ed.2d 68 (1996)], where we held that "forfeiture serves a deterrent purpose distinct from any punitive purpose."

__ U.S. at __, 116 S.Ct. at 2149.

Viewed objectively, there are significant remedial goals intended and served by Megan's Law. Its primary focus is the protection of children and others from previously-convicted sex offenders, near them in the community, who have been found to have a moderate or high risk of re-offense. The tailored notification for each Tier II and Tier III offender is designed to serve that remedial goal. An objective deterrent purpose also emerges from the statutory scheme. Aware that he is registered with local authorities and that his identity has been revealed to certain segments of the community, the Tier II or III offender should be deterred from recidivism, at least in the areas where he lives and works. This "deterrent purpose of . . . the law is a necessary complement to its salutary [remedial] operation." (*Artway*, 81 F.3d at 1263). Accordingly, its deterrent function is best classified as predominantly civil not criminal. The "mixture of deterrent and salutary purposes" (*ibid.*) driving Megan's Law does not make its notification features "punishment."

No persuasive argument can be made that, even viewed objectively, the legislative purpose behind Megan's Law was retributive. It is not an instrument of "vengeance for its own sake", rather it "seek[s] to affect [a broad range] of future conduct" by registrants and the public alike. (*Id.* at 1255). It has goals of preventing or at least decreasing the opportunity and incentive for a societal problem: sexual molestation and similar enumerated offenses. The means employed (Tier II and

III notifications) are directly proportional to the ends which Megan's Law is designed to serve. Viewed objectively, there are no punitive, penal purposes motivating Megan's Law; it is a remedial statute.

2. Historical Analysis

Although this Court is wary of applying *Austin* in the case at bar, due to the *Ursery* decision, and although the latter also teaches that the rigid format resulting from *Artway*'s efforts at "synthesis" was ill-conceived, nevertheless, all informative precedent, including *Ursery*, instructs that in determining whether particular conduct constitutes "punishment," one should search for and examine any historical antecedents. In some cases, such as *Ursery*, this is a rather easy task. Citing a line of statutes and cases spanning more than 200 years, including three more recent decisions directly on point,[16] the Court in *Ursery* held that, historically, civil *in rem* forfeitures had never been considered punishment. However, the classification and notification provisions of Megan's Law measured against the Constitution's *ex post facto* and double jeopardy clauses have no such identical historical antecedents. While it is tempting to end the inquiry at that, declaring this factor inapplicable to the case at bar, the Court will resist that temptation, particularly in light of the considerable emphasis placed upon this issue by all parties.

The "appropriate concern in a historical inquiry is the nature of the measure itself." *Artway*, 81 F.3d at 1257. If the impact of

16. *Various Items of Personal Property v. United States*, 282 U.S. 577, 581, 51 S.Ct. 282, 283, 75 L.Ed. 558 (1931); *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 235-36, 93 S.Ct. 489, 492-93, 34 L.Ed.2d 438 (1972); and *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984).

the law is one that was historically regarded as punitive then it "is punishment unless the text *or* legislative history shows a contrary purpose." (*Id.*) (emphasis added).

This does not require that the same provisions existed in the law at the time of the drafting of the Constitution. Rather, the evaluation must be done through the prism of modern life and technology to determine if the measures are "sufficiently analogous to the early forms of punishment . . . to label them punishment in their own right." Michelle Pia Jerusalem, *A Framework for Post-Sentence Sex Offender Legislation: Perspectives on Prevention, Registration, and the Public's Right to Know*, 48 Vand.L.Rev. 219, 230 (1995).

Although incarceration and fines are the primary method of punishment in modern American society, this is a relatively recent development. "[G]enerally not until the nineteenth century were prisons used for anything but detention of prisoners awaiting trial or execution after conviction." Wolfgang, *Criminology: Crime and Punishment in Renaissance Florence*, 81 J.Crim.L. 567, 576 (1990). In fact, New Jersey's first state prison was not opened until 1797. Frankel, *Crime Treatment in New Jersey: 1668-1934*, 28 J.Crim.L. & Criminology 90, 96 (1937). Instead, many punishments relied on shaming and public humiliation to achieve their desired effect. Jon A. Brilliant, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions*, 1989 Duke L.J. 1357, 1360. Colonial "magistrates . . . loved to enlist the community, the bystanders; their scorn, and the sinners' humiliation were part of the process." Lawrence M. Friedman, *Crime and Punishment in American History* 37 (1993); *see also* Brilliant, *supra*, at 1360-61 ("degradation figured largely in all contemporary [colonial] theories of punishment"). The shaming component was of such import that "authorities often dispensed with the punishment's

physical component entirely: Many humiliated offenders were required simply to stand in public with signs cataloguing their offenses, a punishment that relied solely on mental anguish for its rehabilitative and deterrent effect[17]." Adam J. Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 Mich.L.Rev. 1179, 1225-26 (1982).

The example of this type of punishment which is most familiar today is the literary "Scarlet Letter" from Nathaniel Hawthorne's novel of the same name. The protagonist, Hester Pryne, was forced to wear a scarlet "A" on her clothing to display her conviction for adultery. Hawthorne described the impact the punishment had on the wearer:

> "But the point which drew all eyes, and, as it were, transfigured the wearer . . . was that Scarlet Letter, so fantastically embroidered and illuminated upon her bosom. It had the effect of a spell, taking her out of the ordinary relations with humanity, and enclosing her in a sphere by herself."

Nathaniel Hawthorne, *The Scarlet Letter* 51 (Bantam Classic ed. 1986) (1850). This literary scarlet letter was mirrored by those of real women in colonial America "humbler in its fashioning, worn less nobly, endured more despairingly, it shone a scarlet brand on the breasts of those real Hesters[18]." A. Earle, *Curious Punishments of Bygone Days* 86 (1896).

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17. "In Maine, in 1761, Sarah Morgan, who had the effrontery to strike her husband, was ordered 'to stand with a gagg in her Mouth halfe an houre at Kittery at a Publique Town meeting & the cause of her offence writt upon her forehead, or pay 50 s[hillings] to the County.' " *Doe*, 142 N.J. at 140, 662 A.2d 367 (Stein, J., dissenting) (citations omitted).

18. Persons convicted of theft, robbery and forgery were also required to wear scarlet letters as evidence of their crimes. Friedman, *supra*, at 75.

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Certainly the notification provisions do not actually require registrants to wear a "Scarlet S," but the question before the Court is whether, by analogy, the provisions are the same. The purpose of requiring the offender to wear the brand or letter was to make his crime known to all citizens that he might encounter. Similarly, Megan's Law informs those likely to encounter the offender, assisted by the technological advances of photography and xerographic reproduction. Once the citizenry has been made aware of the offender's crimes, it may well be anticipated that they will greet him with ostracism and opprobrium. These colonial punishments were not without a remedial function, as they could warn individuals about dealing with a person of poor moral character. "The message was that *this* offender was not likely to mend his ways. . . ." Friedman, *supra*, at 40.

These historical punishments typically involved the physical participation of the offender. Megan's Law notification provisions, as distinguished from registration, require no such participation by the registrant. It could be argued that this is simply a function of modern technology rather than a practical difference in effect, which is the present focus of inquiry. Colonial magistrates had no other means to identify the individual other than through public display or marking. Today, a photocopied notice can serve the same purpose with greater efficiency.

Nor should the secularization of modern society lead one to underestimate the gravity of the offenses for which the shaming punishments were meted out. In colonial society, adultery and other moral offenses were significant infractions.

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Shaming was also part of the punishment for offenses covered under Megan's Law such as rape[19].

The resulting impact of Megan's Law may also be analogous to another form of colonial punishment: banishment. In order to avoid the censure of the law, some registrants have left the state. (*E.g.* Alexander *Artway* and Carlos Diaz). This was also a function of the punishment for colonial rapists who could avoid future whippings by leaving the Province.

Due to the nature of the notice provided to the public, attention also focuses on the registrant's employer. There have been numerous instances where registrants have lost their jobs following notification. (*See, e.g.* Plaintiffs' App. at A-6-10, A-82-90, A-150) This was also a function of branding, which ". . . would preclude those who were branded from finding employment and thus 'render[ ] them desperate.' " Brilliant,

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19. One rapist in colonial New Jersey was sentenced to be publicly flogged in various places throughout the community.

> thou shalt be whipt this day betwixt the howers of two and three in the afternoon upon thy naked body at a Carts tayle, from the house of John Butcher in this Towne, to the house where Abraham Senior inhabitteth and from hence on the River side to the High Street, and from thence downe to the Markett house. . . .

This sentence was repeated "every third Seventh day" for three months. For the next nineteen months thereafter, the offender was to be "brought (when thou canst be found within this Province) to each and every Quarterly Sessions at Burlington within said tyme, and then and there to be whipt in manner and forme as afore is mentioned." H. Weiss & G. Weiss, *An Introduction to Crime and Punishment in Colonial New Jersey* 58 (Past Times Press 1960).

supra, 1989 Duke L.J. at 1361 (quoting G. Ives, *A History of Penal Methods* 53 (1914)).

It is well documented that ostracism and opprobrium are consistently among the effects of community notification. (*See* Plaintiffs' App. at A-1-156). They are not unanticipated results of community reaction to a known sex offender.

There are, however, critical, dispositive differences between Megan's Law and the historical shaming punishments set forth above. First, the potential ostracism and opprobrium that may result from a classification at Tier II or Tier III is not inevitable, as it was with the person whipped, pilloried or branded in public. Secondly, whether viewed subjectively or objectively, Megan's Law is not punitive in purpose. Its text (particularly as amplified by the requirements implemented under *Doe v. Poritz*) and its legislative history (though meager) contradict any alleged historical punitive purpose. *Artway* at 1257. Megan's Law is not the product of a lust for retribution; it is a measured attempt to achieve remedial with attendant deterrent goals. The shaming punishments of colonial times were intended to and did visit society's wrath directly upon the offender; Megan's Law has different, protective purposes. Third, the shaming punishments employed contemporaneous societal reaction as an integral part of the sentence for the crime committed. Whether the impact of Megan's Law is or is not punishment, no party to the case at bar has argued (even under double jeopardy principles) that an offender is being sentenced or resentenced in classification proceedings. Those are separate proceedings involving a separate risk assessment. Even if this latter argument emphasizes form over substance, nevertheless it demonstrates a distinction between the public shaming sentences of the past and the operation of Megan's Law. Finally, the historical punishments

tendered by the plaintiffs have no counterpart in the due process procedures established to tailor carefully the resulting classification and scope of notification for each Tier II or III designee. Those procedures are now part of the "text" of the law which can and does demonstrate a non-punitive "purpose" even if shaming punishments comprise a valid historical analogue. *Artway* at 1257.

Moreover, there are other historical remedial measures more comparable to Megan's Law than the stocks, public whippings and scarlet letters.

A government has always had the authority to warn the community about the presence of dangerous persons, and such warnings have never been understood as imposing unconstitutional "punishment." For example, authorities have used "wanted" posters since the earliest days of the republic, not to penalize the person depicted, but to protect the public and help apprehend that person. In addition to providing identifying information concerning fugitives from justice, the FBI's wanted posters also warn, if appropriate, that the fugitives are "extremely dangerous." *See* FBI Wanted Posters, Exh. 20. *Cf.* PA388-90 (sample of community notices).[20]

The FBI also uses television to attract attention to its Ten Most Wanted list, however, notification under Megan's Law is much more limited. The state is not permitted to use press releases or radio announcements in conducting community notification. (Guidelines, Exh. 19 at 15).

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20. The analogy is not perfect, of course, since the whereabouts of a fugitive is usually unknown and that of a Tier II or III designee is disclosed in the notice; however, the protective remedial purposes are similar.

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The law enforcement community's longstanding tradition of community notification for remedial purposes continues to this day. The Bureau of Prisons warns members of the community when prisoners escape into their midst, not only to aid in their apprehension, but also to allow citizens to protect themselves. Further, federal statutes enacted within the last 10 years require law enforcement officials to warn federal crime victims of an offender's possible parole, escape, furlough, or any other form of release. *See* 42 U.S.C. §§ 10606(b)(7), 10607(c)(3)(E) and (G), (c)(5)(A) and (B).

The State of New Jersey has similar procedures. When an offender is paroled, the public is given notice about an offender and his crime. Since 1979, the Parole Board has been required to give public notice prior to considering the release of any inmate. N.J.S.A. 30:4-123.48, 30:4-123.45. This information is provided not only to criminal justice agencies but also to "news organizations." (*Ibid.*) In addition, it has been New Jersey policy since 1989 to provide additional notice to county prosecutors and crime victims at the time of release from prison. *See* N.J.S.A. 52:4B-44 (statute authorizing notice to ensure the rights of crime victims).

Neither in the case at bar, nor elsewhere to this Court's knowledge, has it been argued that any of the above forms of notification impose punishment as contemplated by the double jeopardy and *ex post facto* clauses. The community notification provisions of Megan's Law resemble the above forms of notification, because it too is designed to help protect the public from persons who present a substantial risk of violence or similar dangerous behavior.

Finally, before turning to an analysis of the effects of

notification and its predictable community reaction, the Court notes that *Kurth Ranch* has little relevance in the case at bar. That case, involving the alleged misuse of a tax statute for actual penal purposes, is best confined either to its specific setting or, at least, to a situation where a statute is significantly diverted from its ostensible purpose. Also, because, as developed earlier, Megan's Law is a remedial statute with at most a deterrent objective "incidental" to its "salutary purpose", it would pass muster under *Kurth Ranch*. *Artway*, 81 F.3d at 1266.

3. Effects

Although, once again, *Ursery* casts considerable doubt upon whether a separate "effects" hurdle must be scaled in order for Megan's Law to withstand the present constitutional attack, *Ursery* itself suggests that both purpose and effect are considerations in an *ex post facto* or double jeopardy analysis. It is also not entirely clear whether the borrowing of *Morales* to establish an effects test for Megan's Law is consistent with *Ursery*. *See also Artway v. Attorney General of the State of New Jersey*, 83 F.3d 594, 595-98 (3d Cir.1996) (Opinion Sur Denial of Rehearing In Banc, Alito, J. dissenting). Nevertheless, because application of *Artway*'s effects test demonstrates that the classification and notification provisions of Megan's Law are constitutional, this Court does not hesitate to apply it.

A statute may also constitute punishment if the effects have a powerful enough "sting." *California Department of Corrections v. Morales*, __ U.S. __, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995). "If the negative repercussions — regardless of how they are justified — are great enough, the measure must be considered punishment." *Artway*, 81 F.3d at 1263. Whether the sting is great enough "is a matter of degree." (*Id.* at 1261 (quoting *Morales*, __ U.S. at __, 115 S.Ct. at 1603)).

Appendix H

While the "effects" test may be implicit in the Supreme Court's Opinion in *Morales*, it arose in a context in which a definition of punishment was not directly at issue. The sanction in *Morales* was incarceration, and the Court focused on whether the "effect" of new legislation delaying parole hearings was to increase or extend the acknowledged punishment of incarceration. __ U.S. at __ n. 7, 115 S.Ct. at 1604 n. 7, 131 L.Ed.2d at 597 n. 7. The Court held that such an alleged effect was "speculative and attenuated" where the legislation was carefully tailored and the amendment applied "only to a class of prisoners for whom the likelihood of release on parole is quite remote." __ U.S. at __, 115 S.Ct. at 1603, 131 L.Ed.2d at 597. In fact the *Morales* Court did not find it necessary "to discuss *Austin* and its progeny because the facts of *Morales* involved imprisonment." *Artway*, 81 F.3d at 1261.

Under such circumstances, at the very least, this Court should apply the effects test only in circumstances where, although all other considerations do not support *ex post facto* or double jeopardy arguments, the effects of subsequent legislation, if applied retroactively, would be predictably severe.

As discussed above, the only effects which should be considered under the Court's analysis are those flowing out of the legal actions of notice recipients. Specific instances of such community reaction are a matter of record in this case and have been referred to previously. As such, it is unlikely that those effects would be appreciably greater than those measures which have been found not to be punishment. *See, e.g., De Veau v. Braisted*, 363 U.S. 144, 80 S.Ct. 1146, 4 L.Ed.2d 1109 (1960) (forbidding work as a union official to former convicts); *Hawker v. New York*, 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002 (1898) (revocation of a medical license); *Mahler v. Eby*, 264 U.S. 32,

44 S.Ct. 283, 68 L.Ed. 549 (1924) (deportation); *Flemming v. Nestor*, 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960) (termination of Social Security benefits). Even if some of the effects described in the case at bar might be considered slightly more severe than those examples, they do not demonstrate such uniform severe effects which as a matter "of degree" would constitute punishment inflicted on the plaintiffs either as a class or individually. *Artway*, 81 F.3d at 1263.

VIII. Due Process

Plaintiffs also challenge Megan's Law on the grounds that the classification process fails to comport with procedural due process. No state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The initial question is whether there is a liberty interest under federal or state law which is implicated.

The Supreme Court of New Jersey found there to be a liberty interest under state law in *Doe*. *Doe*, 142 N.J. at 104-106, 662 A.2d 367. Limitations on state-created interest alone is sufficient to trigger due process. *Hewitt v. Helms*, 459 U.S. 460, 469-72, 103 S.Ct. 864, 870-72, 74 L.Ed.2d 675 (1983).

The *Doe* Court also recognized a federally-protected liberty interest implicated by Megan's Law and this Court agrees. *Doe*, 142 N.J. at 100-104, 662 A.2d 367. "[R]eputation alone, apart from some more tangible interests such as employment, is [not] either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." *Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160, 47 L.Ed.2d 405 (1976). Instead, the action must alter " 'a right or status previously recognized by state law,' for it is that 'alteration, officially

removing the interest from the recognition previously afforded by the State, which [the Court has] found sufficient to invoke the procedural guarantees contained in the Due Process clause of the Fourteenth Amendment.' " *Doe*, 142 N.J. at 102, 662 A.2d 367 (quoting *Paul*, 424 U.S. at 711, 96 S.Ct. at 1165).

Paul has been interpreted to require "stigma plus" some other impediment to involve a liberty interest. *Valmonte v. Bane*, 18 F.3d 992, 999 (2d Cir.1994); *see also Sturm v. Clark*, 835 F.2d 1009, 1012 (3d Cir.1987); *Borucki v. Ryan*, 827 F.2d 836, 842-43 (1st Cir.1987). The *Doe* Court found the "harm to plaintiff's reputation, when coupled with the incursion on his right to privacy . . . constitutes a protectible interest." *Doe*, 142 N.J. at 103, 662 A.2d 367. Such a result may also be reached by coupling the reputational damage with the loss of employment opportunities[21] or, more directly, the continuing legal status as a registrant and the duties imposed as a result.

Once a liberty interest has been discerned, the degree of process required is flexible and dependent upon the circumstances of a given case. *Zinermon v. Burch*, 494 U.S. 113, 127, 110 S.Ct. 975, 983-84, 108 L.Ed.2d 100 (1990); *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 902-03, 47 L.Ed.2d 18 (1976). There must be sufficient notice and a meaningful opportunity to be heard. *U.S. v. Raffoul*, 826 F.2d 218, 222 (3d Cir.1987); *Kahn v. U.S.*, 753 F.2d 1208, 1218 (3d Cir.1985).

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21. *See, e.g. Fitzgerald v. Mountain Laurel Racing, Inc.*, 607 F.2d 589, 602 (3d Cir.1979), *cert. denied*, 446 U.S. 956, 100 S.Ct. 2927, 64 L.Ed.2d 814 (1980) (loss of clients was cognizable under the Due Process Clause).

Appendix H

A. Notice

In fashioning its modifications to Megan's Law, the *Doe* court stated that "in some cases it may be impossible as a practical matter to give such notice, or to give it timely, and in those cases it may be dispensed with." Under the Attorney General's Guidelines, notice may be dispensed with when the "Prosecutor's Office does not receive notification of the release of a person determined to be a Tier III offender until after the date of release . . . for example, when an offender who has been civilly committed is released on short notice by a judge." (Guidelines For Law Enforcement for Notification to Local Officials and/or the Community of the Entry of a Sex Offender Into the Community A-327). The prosecutor must still seek judicial approval of notification without notice prior to its dissemination. (*Id.*)

Although the exigency presented in some cases may be questionable, this guideline, as a general proposition, does not offend the notice requirement. In the vast majority of cases, timely notice is provided to the registrant prior to notification. (*Id.; see also, e.g.* Plaintiffs' App. at A-158, A- 162, A-188, A-194).

B. Hearing

The judicial hearing itself will now be evaluated. Four factors must be considered in analyzing the procedure: (1) the importance of the private interest; (2) the length or finality of the deprivation; (3) the risk of government error; and (4) the magnitude of the government interest involved. *Mathews*, 424 U.S. at 334-35, 96 S.Ct. at 902-03. As has already been discussed above, there is an important private interest implicated here.

The deprivation is for a minimum of 15 years to life. There is also a public interest of great magnitude, the threat posed by sex offenders in the community. It is the application of the third prong of *Mathews* which requires greater scrutiny. Upon a complete review of this issue, the Court determines that the risk of government error under the current statutory and regulatory scheme is not so high that it denies due process to a sex offender subject to classification/notification proceedings.

The Supreme Court of New Jersey has laid out a comprehensive scheme for judicial review of Tier level determinations and method of notification. The Court determined that any person covered by the law can seek judicial review of a Tier II or Tier III classification and the manner of notification prior to actual notification. Under Megan's Law, pursuant to the court's decision:

> (1) except in exigent circumstances, offenders subject to notification will receive written notice at least two weeks in advance, detailing the proposed Tier level and the specific manner proposed for notification;
>
> (2) the offender has the right to object to notification by filing a simple application with the court in his own county;
>
> (3) the offender is entitled to an automatic stay of notification if he files a timely objection;
>
> (4) the offender has the right to be represented by retained counsel, or, if he cannot afford it, to have free counsel appointed by the court;

(5) the court must immediately set a date for a pre-notification court hearing;

(6) the offender must receive extensive pre-hearing discovery of "all papers, documents, and other materials, including the prosecutor's findings and statement of reasons for the level and manner of the proposed notification;"

(7) the offender must receive a hearing before a neutral fact-finder, a state trial court judge;

(8) the offender's privacy is protected because the hearing must be *in camera*;

(9) at the hearing, the State must present evidence establishing a *prima facie* case justifying the proposed Tier level and manner of notification;

(10) the offender then has the opportunity to rebut the State's *prima facie* case, which he must do by a preponderance of the evidence;

(11) the rules of evidence do not apply at the court hearing;

(12) notification cannot occur unless it is approved or meets the requirements set by the court; and

(13) if the court allows notification, the offender may seek to stay notification "to allow time for application to an appellate court."

Doe v. Poritz, 142 N.J. at 30-35, 662 A.2d 367.

Appendix H

1. Registrant Risk Assessment Scale

The Attorney General has designed a Registrant Risk Assessment Scale ("RRAS") to be utilized by the county prosecutors in determining the appropriate Tier level for a given registrant. A blank copy of the RRAS is annexed hereto as Exhibit A. The RRAS has four categories: seriousness of offense, offense history, characteristics of offender and community support, with 13 individual indices within them. Due to the weighting of factors, past conduct can result in 90 of the maximum 111 points in the scale. *Artway*, 81 F.3d at 1266 n. 30. The prosecutor enters the information about the offender in the scale and generates a numerical score. Based upon the score, the registrant will fall into one of the Tier ranges.

The Supreme Court of New Jersey has described the central inquiry of "risk of re-offense" in *Doe*.

> The only issue for the court on the Tier level of notification is the risk of reoffense. In that sense the factors of the Guidelines noting the characteristics of the prior offenses or the offender are relevant only to the risk of re-offense, *i.e.*, the likelihood of its occurrence. That is the clear intent of the statute.

Doe, 142 N.J. at 32-33, 662 A.2d 367. Plaintiffs argue that the RRAS, through its weighting of the indices, compels the "risk" to be defined by the severity of the registrant's *past* acts; therefore, if the nature of the acts previously committed is extensive enough, the RRAS may tier the registrant beyond his actual risk of re-offense. Plaintiffs, however, misconceive the "risk of re-offense" inquiry. The New Jersey Legislature has determined that all sex offenders have a likelihood of recidivism

sufficiently significant to warrant the enactment of Megan's Law.[22] The inquiry is not directed to the actual probability of re-offense but rather to a calculation of *relative* or *comparative* risk of re-offense from which results a determination of either "low" (Tier I), "moderate" (Tier II), or "high" (Tier III) risk for a particular offender. *Doe* makes this clear distinction.

> All offenders required to register are, by statute, subject to at least Tier One notification, meaning that no matter how low the risk of reoffense, the Legislature has concluded Tier One notification is required.
>
> * * * * * *
>
> We note further that quite obviously none of these standards or classes suggests the court must make a finding of likelihood of reoffense, for the Legislature did not impose either Tier Two or Tier Three notification only when it was probable that reoffense would occur, but rather only when the risk — however quantified — was sufficient to warrant such notification. The quality of the offense — a sex offense — undoubtedly led to this legislative conclusion that notification was warranted even when reoffense was not probable, and that legislative conclusion is unassailable in any proceedings before the court. Therefore the probability of reoffense on the part of moderate or high-risk offenders is not the issue before the court, but rather the relatively greater risk of

22. Statistical and other empirical evidence regarding recidivism rates for sex offenders varies widely. There is support for nearly every point of view. It is not this Court's duty, however, to question the Legislature's choice of support for its conclusions.

> reoffense compared either to the low-risk offender class or the moderate-risk offender class.

(*Id.* at 34, 662 A.2d 367). With this understanding of the nature of classification proceedings and the role therein played by the RRAS, it cannot be said that there is such a "risk of error" in determining an offender's relative risk of re-offense as to deprive him of procedural due process. *Mathews v. Eldridge*, 424 U.S. 319, 344, 96 S.Ct. 893, 907, 47 L.Ed.2d 18 (1976). Indeed the scheme established for classification proceedings under Megan's law is comparable to that found adequate in *Mathews*.

Plaintiffs also argue that a failure to provide for reduction of the RRAS score for indicia of successful rehabilitation exacerbates the overstatement of the risk of re-offense. Where the relevant inquiry is one of relativity, however, this argument is not persuasive. It also assumes a right to have the thresholds for moderate and high risk remain at 37 and 74 respectively even if the requested deduction were put in place. No offender has such a right; certainly not one that implicates constitutional considerations. Those thresholds could reasonably be lowered if the deductions which plaintiffs espouse were allowed. Finally, several aspects of rehabilitation are addressed in the RRAS, and if those findings are favorable to the offender his score is not increased as it would be were that not the case.

2. Proceedings Before the State Court

The proceedings resulting in classification of a sex offender at Tier I, II or III are not criminal. No valid argument can be made, for example, that the registrant has a right to a jury trial in the review of the county prosecutor's classification decision. Furthermore, even though civil in nature, no jury trial right in

that realm exists for such a proceeding. The legislative/regulative pattern that has emerged in the wake of *Doe v. Poritz* is practically *sui generis*.[23] It is most analogous to an administrative proceeding encompassing judicial review. Under such circumstances, particularly since the consequences of classification are not punishment as such (*supra*), due process protections are not as extensive as those required in a plenary criminal or civil trial. *See Mathews v. Eldridge, supra*, approving a procedure entailing a hearing after an initial adverse administrative determination. If the format adopted by the State of New Jersey provides at least the minimum due process required in such classification proceedings this Court must sustain it, even if greater safeguards for the rights of a registrant might have been adopted. Stated otherwise, this Court is not here to analyze the wisdom of the State's chosen procedures, only their constitutionality. The format established by the State of New Jersey, in a joint effort of its legislative, executive and judicial branches, provides due process to the registrant. After receiving notice of the prosecutor's classification, the offender has the right to be heard promptly before a specially assigned judge of the Superior Court, Law Division. While the scope of state judicial review has limitations, the rules of evidence do not apply (to evidence presented by either party), and the registrant must prove by a preponderance of the evidence that his Tier classification is erroneous. These rules are well within the boundaries of due process requirements for such proceedings. One must also keep in mind that the most critical element of a registrant's classification: his prior conviction(s), has already been proven either by his own admission of guilt or

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23. The *Doe* Court described the Superior Court's review as a "summary proceeding" (*Doe*, at 30-31, 662 A.2d 367) although the procedures described in *Doe* and later implemented do not mirror those of N.J.R. 4:67-1 *et seq*.

at a trial in which the State of New Jersey bore the burden of proof beyond a reasonable doubt.

Furthermore, even though the RRAS heavily weights the nature of the registrant's past offense(s), this is not violative of constitutional due process. *Supra*. This scale represents a permissible state choice. More particularly, although the prior offenses are heavily weighted, a high "score" is required to place a registrant at Tier III. The statistics presented to this Court show that only about 5% of registrants subjected to Tier classification have been classified at Tier III where the greatest potential threat to the registrant's liberty interest is present. This does not demonstrate a grossly excessive weight accorded to past offenses on the RRAS scale.[24]

The record before this Court also demonstrates that in a significant number of proceedings brought before the Superior Court, the Tier classification derived by the county prosecutor has been reduced by the reviewing judge. This is but further evidence that due process is being afforded to persons subject to Megan's Law.

Plaintiffs also attack the obligation that an offender must overcome the prosecutor's *prima facie* case by a preponderance of the evidence. It is neither unusual nor impermissible to assign

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24. The Court has also been advised that there are classification cases presently before the Supreme Court of New Jersey directly challenging this feature of the RRAS. Without either abdicating its responsibility here or invoking any formal doctrine of abstention, this Court notes that the Supreme Court of New Jersey is a very appropriate forum in which that issue can and should be addressed. These developments further demonstrate that Megan's Law is affording procedural due process to members of the plaintiff class.

the burden of proof to a party who initiates a court proceeding to overrule or modify the decisions or actions of another. Stated otherwise, the offender who initiates a proceeding before the Superior Court for review of his Tier classification is not unlike a plaintiff in a civil action, one who traditionally bears the burden of proof by a preponderance of the evidence. Furthermore, under Megan's Law, the prosecutor must establish a *prima facie* case before the offender is required to go forward. Although both appropriate and understandable in such a situation, this requirement placed upon the prosecutor affords to the offender a procedural benefit not enjoyed by a traditional civil plaintiff. At the very least, the scheme established by the *Doe* Court is within the "flexible" boundaries of procedural due process recognized in *Mathews.*

Other court decisions demonstrate the adequacy of Megan's Law hearings. In *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), the Court set forth the basic requirements for a state parole revocation hearing. There was no express allocation of the burden of proof; however, the Court stated, "The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation." (*Id.* at 488, 92 S.Ct. at 2603). This language suggests that there is at least a burden of production assigned to a parolee in such a hearing. In addition, the Supreme Court added, "It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." (*Id.* at 489, 92 S.Ct. at 2604). If a hearing of this nature satisfies fourteenth amendment due process requirements for a parolee faced with a return to jail, the proceedings under Megan's Law are adequate for a person facing less drastic

consequences. *See also Kahn v. United States*, 753 F.2d 1208 (3d Cir.1985), acknowledging and applying the *Mathews* tests in upholding against a fifth amendment due process attack certain provisions in the Internal Revenue Code providing for payment of 15% of an assessed penalty prior to any administrative hearing.

For the reasons set forth immediately above, the Court determines that defendants are entitled to summary judgment dismissing plaintiffs' claims that the Tier classification procedures of Megan's law violate the fourteenth amendment's Due Process Clause.

CONCLUSION

The Court has addressed above the facts of record and legal principles which it has determined are material to the adjudication of the pending summary judgment motions. Several other arguments have been presented to the Court in the numerous briefs, exhibits, affidavits and oral arguments in this matter. Any not addressed expressly herein have nevertheless been fully considered.

Additionally, in re-examining the foregoing Opinion, this Court concludes that although *Ursery* affected the approach employed in analyzing Megan's Law, the result in this case would be the same even under the more rigid formula of *Artway* that requires one to leap over the hurdles which that Opinion erects on the track to the finish line. This Court presents this clarification because it may be of some importance to a reviewing court.

Summary judgment is entered for the defendants upon each

Count of the plaintiff class's Second Amended Complaint. Those claims are dismissed with prejudice. Plaintiffs' motions for summary judgment are denied. Because the plaintiffs have been represented by the Office of the Public Defender, no taxable costs will be imposed; all parties are to bear their own. At oral argument, plaintiffs' counsel requested a stay of this Court's decision, should it be adverse to his clients. That application is denied; however, pursuant to 28 U.S.C. § 1651 and its inherent powers, this Court extends its preliminary injunction herein, in all respects, to 12:00 noon, July 9, 1996, in order to afford to the plaintiff class the opportunity to initiate an appeal and seek interim relief before the United States Court of Appeals for the Third Circuit. Finally, when that preliminary injunction expires, the security posted by the plaintiffs pursuant to Fed.R.Civ.P. 65(c) will be returned. Despite this Court's ultimate decision in favor of the defendants, it could not conceivably be argued that they were "wrongfully enjoined or restrained" by the preliminary injunction. (*Id.*) That injunction was properly granted and continued; indeed it was essential to the preservation of the status quo and the rights of all parties pending final adjudication of the many issues in this action. An Order reflecting the foregoing decisions accompanies this Opinion.

ORDER

For the reasons set forth in the Court' Opinion filed herewith,

It is on this 1st day of July, 1996, **ORDERED** that:

1. Defendants' motion for summary judgment upon each Count of plaintiffs' Second Amended Complaint be and it hereby is granted, and plaintiffs' Second Amended Complaint be and it hereby is dismissed, with prejudice;

2. Plaintiffs' motions for summary judgment be and they hereby are denied;

3. This matter is hereby dismissed without imposition of taxable costs; all parties are to bear their own;

4. Plaintiffs, application for a stay of this decision be and it hereby is denied;

5. The preliminary injunction previously entered herein, as set forth in this Court's Order of January 26, 1996 and extended by subsequent Orders, be and it hereby is extended to 12:00 noon, July 9, 1996; and

6. Upon the expiration of said preliminary injunction, all security posted with this Court pursuant to Fed.R.Civ.P. 65(c) shall forthwith be returned to the plaintiffs.

APPENDIX I — OPINION OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY, DATED MARCH 15, 1996

W.P., et al., Individually and as Representatives of a Class pursuant to Fed.R.Civ.P. 23(a) and 23(b)(2),

Plaintiffs,

v.

Deborah PORITZ, Attorney General of New Jersey; Jeffrey S. Blitz, Atlantic County Prosecutor; Charles R. Buckley, Acting Bergen County Prosecutor; Stephen G. Raymond, Burlington County Prosecutor; Joseph P. Audino, Acting Camden County Prosecutor; Stephen D. Moore, Cape May County Prosecutor; Neil S. Cooper, Acting Cumberland County Prosecutor; Clifford J. Minor, Essex County Prosecutor; Harris Y. Cotton, Gloucester County Prosecutor; Carmen Messano, Hudson County Prosecutor; Sharon B. Ransavage, Hunterdon County Prosecutor; Marryann K. Bielamowicz, Mercer County Prosecutor; Robert W. Gluck, Middlesex County Prosecutor; John Kaye, Monmouth County Prosecutor; W. Michael Murphy, Jr., Morris County Prosecutor; Daniel J. Carluccio, Ocean County Prosecutor; Ronald S. Fava, Passaic County Prosecutor; Ronald A. Epstein, Salem County Prosecutor; Melaine B. Campbell, Acting Somerset County Prosecutor; Dennis O'Leary, Sussex County Prosecutor; Edward Neafsey, Acting Union County Prosecutor; and John J. O'Reilly, Warren County Prosecutor,

Defendants.

Appendix I

Civil Action No. 96-97.

United States District Court,
D. New Jersey.

March 15, 1996.

* * *

OPINION

BISSELL, District Judge.

This matter comes before the Court on the plaintiffs' motion to certify a class action. The present action was filed on January 16, 1996. The plaintiffs seek to enjoin the defendants from enforcing the Community Notification Act, N.J.S.A. 2C:7-1 et seq., (Megan's Law). (First Amended Complaint, hereinafter "Compl." at 9-10)

Plaintiff's claim that Megan's Law violates the *ex post facto* and double jeopardy clauses of the United States Constitution. (Compl., ¶¶ 35, 39) By Order of this Court on January 16, 1996, and subsequent Orders, the defendant has been enjoined from "issuing or disseminating in any manner Tier II or Tier III notifications regarding plaintiffs" until April 19, 1996 or until 10 days after the Third Circuit has issued its opinion on the appeal of *Artway v. Attorney General et al.*, 81 F.3d 1235 (3rd Cir.1996), whichever first occurs.

This Court has jurisdiction pursuant to 28 U.S.C. § 1331, and other statutory authority invoked in the Complaint, including 42 U.S.C. § 1983 and the Declaratory Judgment Act (28 U.S.C. § 2201).

Appendix I

FACTS

Each of the named plaintiffs has been convicted of a sex related offense as the result of a plea of guilty. (Compl., ¶ 8) Currently, they are living in their respective communities within the State of New Jersey. (Compl., ¶¶ 9-30) The named plaintiffs have individually been classified under Megan's Law at either the Tier II or Tier III Level. (Plaintiff's Br. at 6-8). The offenses for which the named plaintiffs were convicted occurred prior to the enactment of Megan's Law. (*Id.*)

Once a registrant is notified of his tier classification under Megan's Law, he must be afforded some judicial review before public notification. *Doe v. Poritz*, 142 N.J. 1, 107, 662 A.2d 367 (1995). The Supreme Court of New Jersey has established an "Outline of Procedure for Hearings on Objections to Megan's Law Tier 2 and Tier 3 Classifications and Manner of Notification Determinations." (Plaintiff's Br., App. A) The parties first have a pre-trial conference, at which time the judge may render a final determination. (*Id.* at A-5) If a hearing is required, then the judge will schedule a date 10-14 days thereafter and conduct an *in camera* proceeding. (*Id.*) At the conclusion of the hearing the judge must make a final determination. (*Id.*)

Originally, it was proposed that members of the private bar represent the registrants during these proceedings. *See* Maureen Castellano *Who Will Blink First?; Bar Balks at Pro Bono; Wilentz Doesn't Budge*, N.J.L.J., Oct. 30, 1995 at 1. Because of some difficulties with such pro bono representation, a plan was developed under which the majority of these individuals are represented by the New Jersey Public Defender. *See* Michael Booth, *Public Defender to Take Over Megan's Law Representation*, N.J.L.J., Nov. 6, 1995 at 4; Russ Bleemer,

Appendix I

Complaints Mount as Megan's Law Hearings Begin, N.J.L.J. Oct. 23, 1995 at 1.

As a result, the Office of the Public Defender has sought emergent relief from this Court on three separate occasions, as well as in proceedings before Judges Politan and Simandle. The focus of these proceedings has been the same: to enjoin the classification and notification process while the Third Circuit decides the *ex post facto* and double jeopardy constitutional issues in *Artway v. Attorney General, et al.* In each of these cases, this relief has been granted.

The plaintiffs now seek to certify a class which consists of:

> All persons required to register as a sex offender [*sic*] pursuant to N.J.S.A. 2C:7-1 et seq. and whose offenses were committed prior to October 31, 1994, the effective date of the New Jersey Registration and Community Notification Laws, and who have been or will be classified as a tier II or tier III offender.

(Complaint at ¶ 5). They also seek injunctive relief for the class.

ANALYSIS

I. Certification of the Class Action

The decision concerning class certification is committed to the broad discretion of the District Judge. *Wetzel v. Liberty Mutual Ins. Co.,* 508 F.2d 239, 245 (3d Cir.1975), *cert. denied,* 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975). The plaintiffs have the burden of showing class certification is proper pursuant to Fed.R.Civ.P. 23. *Id.* To sustain a class certification, the named plaintiffs must first satisfy the requirements of

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Fed.R.Civ.P. 23(a). *In re Data Access Systems Securities Litigation,* 103 F.R.D. 130, 131 (D.N.J.1984).

Rule 23(a) provides that:

> One or more members of a class may sue . . . as representative parties on behalf of all only if
>
> (1) the class is so numerous that joinder of all members is impracticable,
>
> (2) there are questions of law or fact common to the class,
>
> (3) the claims . . . of the representative parties are typical of the claims . . . of the class, and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a).

If the requirements of 23(a) are met, then the plaintiffs must show that they are in one of the categories defined by Rule 23(b). The plaintiffs here purport to bring this action pursuant to Rule 23(b)(2) because

> (2) the party opposing the class has acted or refuses to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . .

Fed.R.Civ.P. 23(b)(2).

Appendix I

A. Numerosity

The numerosity requirement demands that the class be so large that joinder of all members would be "impracticable." Fed.R.Civ.P. 23(a). In the context of class actions, "impracticability" does not mean impossibility "but only the difficulty or inconvenience of joining all members of the class." *Zinberg v. Washington Bancorp, Inc.*, 138 F.R.D. 397, 406 (D.N.J.1990) (*citing Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir.1964)). This standard may be applied more flexibly in cases where injunctive relief alone is sought. *Weiss v. York Hospital*, 745 F.2d 786, 808 (3d Cir.1984).

At the present time there are approximately 3380 registrants under Megan's Law, of which up to 2000 may eventually be classified at the Tier II or Tier III levels. (Compl., Exh. A; Plaintiff's Br. at 44).[1] These individuals reside in areas throughout the state. (*Id.*) As each registrant is notified of his or her preliminary classification at Tier II or Tier III, he or she has a limited window prior to final classification and notification in which to petition the U.S. District Court for relief. As a result, the Court has been, and in the future undoubtedly will be, required to entertain numerous new complaints, motions to add plaintiffs, and applications for temporary restraining orders and preliminary injunctions, on short notice. The continuation of this process for additional plaintiffs is impracticable, cumbersome, and may not insure protection to all who may be entitled to it.

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1. At oral argument and in defendants' papers, several different numbers regarding those persons currently subject to Tier II or Tier III classification were presented to the Court. Even the lowest of these demonstrated sufficient numerosity to justify a class action. *See Weiss*, 745 F.2d at 808, n. 35.

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B. Commonality

The commonality requirement is satisfied "if there are some questions of law or fact common to the class." *Zinberg,* 138 F.R.D. at 406 (*citing Vargas v. Calabrese,* 634 F.Supp. 910, 918 (D.N.J.1986)). These claims do not have to be exactly the same as long as they are not in conflict. *Eisenberg v. Gagnon,* 766 F.2d 770, 786 (3d Cir.1985), *cert. denied,* 474 U.S. 946, 106 S.Ct. 342, 88 L.Ed.2d 290 (1985). If "class members can assert . . . a single common complaint" it is unnecessary that they "have all suffered actual injury; demonstrating that all class members are subject to the same harm will suffice." *Baby Neal for and by Kanter v. Casey,* 43 F.3d 48, 56 (3d. Cir.1994) (emphasis in original).

In this case, the members of the proposed class are all subject to the same type of judicial proceeding and community notification, at either Tier II or Tier III. If the proceedings or notifications violate the *ex post facto* or double jeopardy provisions of the United States Constitution for one of the proposed class members, then that is true for all. Although the proceeding itself is fact specific, this prong dictates that there be common questions of law *or* fact, but not necessarily both. *Id.* The federal constitutional issues of law are common and dominant in the present action.

C. Adequacy of Representation

When plaintiffs' interests are not antagonistic to those of other class members and plaintiffs' attorneys are qualified, the adequacy of representation requirement is met. *Wetzel v. Liberty Mutual Insurance Co.,* 508 F.2d 239, 247 (3d Cir.1975), *cert. denied,* 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975). The defendant has the burden of demonstrating that the

representation would be inadequate. *In re Asbestos School Litigation,* 104 F.R.D. 422, 430 (E.D.Pa.1984) (*citing Lewis v. Curtis,* 671 F.2d 779, 788 (3d Cir.1982), *cert. denied,* 459 U.S. 880, 103 S.Ct. 176, 74 L.Ed.2d 144 (1982)).

Defendant argues that because some registrants have not contested the notification they are not adequately represented. (Defendant's Br. at 4). However this does not make the positions of the class antagonistic to these members. It cannot be seriously argued that any of the registrants under Megan's Law would prefer to have their lives disrupted by notification rather than remain anonymous.[2]

D. Typicality

Rule 23(a)(3) requires that plaintiffs' interests "are more or less coextensive with those of the class." *In re Asbestos School Litigation,* 104 F.R.D. at 429 (*citing Sley v. Jamaica Water & Util.,* 77 F.R.D. 391, 394 (E.D.Pa.1977)). The requirement is

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2. Defendant further argues that notice should be given to allow class members to "opt out". A 23(b)(2) class action does not require notice to the class. *Bolton v. Murray Envelope Corp.,* 553 F.2d 881 (5th Cir.1977); *see also Katz v. Carte Blanche Corp.,* 496 F.2d 747, 756 (3d Cir.). The Court may at its discretion require notice under Rule 23(d)(2). "In most cases, however, 'notice would add little or nothing.' " *Wetzel,* 508 F.2d at 256 (citing J. Moore Federal Practice at 1152 (2d ed. 1974)).

The possible, although unlikely, desire for some individuals to opt out cannot alone support the decision to require notice because in a 23(b)(2) action, members of the class do not have the right to opt out. *Wetzel,* 508 F.2d at 249. Any unfairness caused by this prohibition is "outweighed by the purposes behind class actions." *Id.* Furthermore, the present class is being certified because of the current status of the *Artway* case and the need for preliminary injunctive relief. Depending upon the Third Circuit's decision in *Artway* the duration of this class may be brief.

intended to insure that the class action is "fully, fairly, and vigorously prosecuted." *Id.* Claims are typical if the plaintiffs' claims arise from the same event or course of conduct as the claims of the entire class. *Zinberg,* 138 F.R.D. at 407. "[A]ctions requesting declaratory and injunctive relief to remedy conduct directed at the class clearly fit this mold to satisfy the typicality requirements of Rule 23(a)." *Baby Neal,* 43 F.3d at 58.

The elements that allegedly create the named plaintiffs right to relief: their status as convicted sex offenders residing in New Jersey; the date of their convictions prior to the effective date of Megan's Law; their present or imminent classification and notification under Tier II or III; are definitionally typical of the class. These elements are the primary relevant considerations in determining the constitutional issues that are now before the Third Circuit and this Court.

E. Generally Applicable Acts

Finally the plaintiffs must satisfy Rule 23(b), in this case 23(b)(2), and show that the defendant has "acted or refused to act on grounds generally applicable to the class." Fed.R.Civ.P. 23(b)(2). The Attorney General has acted, as is her duty, to enforce the provisions of Megan's Law. Although there may be differences in the factual settings of the classification hearings or the nature of the notification, they are being prosecuted as part of a general policy and program to enforce the statute. The County Prosecutors presumably are implementing the statute in a uniform manner.[3]

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3. At oral argument on March 13, 1996 regarding the class certification question, accelerated consideration was given to plaintiffs' motion to file a Second Amended Complaint which would, *inter alia,* add all County Prosecutors as defendants. Those persons are indispensable parties; therefore, that motion was granted.

For the reasons set forth above, this Court certifies the plaintiff class as requested and described above.

II. Rooker-Feldman Abstention

A federal district court is not empowered to review the decision of the highest court of a state; that power rests solely with the United States Supreme Court. *ASARCO Inc. v. Kadish,* 490 U.S. 605, 622, 109 S.Ct. 2037, 2048, 104 L.Ed.2d 696 (1989). This is commonly referred to as the *Rooker-Feldman* doctrine, after the cases of *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923) and *District of Columbia Ct. of App. v. Feldman,* 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983).

> " 'If the constitutional claims presented to a United States district court are inextricably intertwined' with the merits of a judgment rendered in the state court, 'then the district court is in essence being called upon to review the state-court decision. This the district court may not do.' "

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 25, 107 S.Ct. 1519, 1533, 95 L.Ed.2d 1 (1987) (Marshall, J. concurring) (citing *Feldman,* 460 U.S. at 483-84 n. 16, 103 S.Ct. at 1315-16 n. 16). If the issues are inextricably intertwined, then the federal court lacks subject matter jurisdiction to hear such claims. *Port Auth. P.B.A. v. Port Auth. of N.Y. & N.J.,* 973 F.2d 169, 177 (3d. Cir.1992).

The Third Circuit has very recently revisited Rooker-Feldman abstention in the case of *FOCUS v. Allegheny Cty. Ct. of Common Pleas,* 75 F.3d 834 (3d Cir.1996). The Third Circuit found that *Rooker-Feldman* does not apply where the plaintiffs

were not parties to the adjudication of the "intertwined" issues. *Id.*, 75 F.3d at 840-41. In *Valenti v. Mitchell,* the Third Circuit stated "we have found no authority which would extend the Rooker-Feldman doctrine to persons not parties to the proceedings before the state supreme court . . ." *Valenti v. Mitchell,* 962 F.2d 288, 297 (3d Cir.1992).

It must be clearly stated that this Court is not being asked to review the decision of the Supreme Court of New Jersey in *Doe v. Poritz.* Instead, this Court is presented with the well-articulated precedent of Judge Politan's decision in *Artway v. Attorney General of New Jersey,* 876 F.Supp. 666 (D.N.J.1995) which was decided prior to *Doe.* Even more importantly, this Court will soon be bound by the decision of the Third Circuit when it is announced in the *Artway* case, whether or not it is in agreement with *Doe v. Poritz.* In summary, this entire proceeding focuses upon the state of federal decisional law on the *ex post facto* and double jeopardy claims underlying it.

III. Younger Abstention

The defendants contend that this Court should abstain from exercising its jurisdiction in accordance with the doctrine described in *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). Under *Younger,* a federal court should refrain from enjoining state court proceedings. *Id.* at 43, 91 S.Ct. at 750. This doctrine has its foundation in principles of equity, comity, and federalism. *Id.* at 43-45, 91 S.Ct. at 750-751. A court must base its actions on "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.* at 44, 91 S.Ct. at 750-51.

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Younger abstention is appropriate whenever there is 1) an ongoing state proceeding; in which 2) an important state interest is implicated; and 3) the plaintiff can obtain review of the constitutional claims in the state court. *Hansel v. Town Court of Springfield, N.Y.*, 56 F.3d 391, 393 (2d Cir.1995); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 102 S.Ct. 2515, 2521, 73 L.Ed.2d 116 (1982). Such an abstention is applicable in a civil as well as criminal context where the noncriminal proceedings are closely related to a criminal action. *Middlesex County*, 457 U.S. at 432, 102 S.Ct. at 2521.

Although the Third Circuit has not ruled on the issue, some other Courts of Appeals have measured the availability of review of constitutional claims merely in terms of procedural or technical infirmity rather than substantive law. *Hansel*, 56 F.3d at 394. These courts have found that the fact that the state Supreme Court "has already rejected similar arguments . . . does not mean those courts have deprived a plaintiff of the *opportunity* to make the argument." *Duty Free Shop v. Administracion De Terrenos De Puerto Rico*, 889 F.2d 1181, 1183 (1st Cir.1989). The plaintiff may take his case through the state system and ultimately petition the Supreme Court of the United States if necessary. *Id.* This rationale has been followed even where there was binding precedent from the state supreme court. *Dubinka v. Judges of Superior Court*, 23 F.3d 218, 224 (9th Cir.1994).

By contrast, other courts, including the District of New Jersey, have taken a broader view of *Younger* and required that there be "an adequate opportunity for *redress* of their constitutional claims" in the state forum. *Bongiorno v. Lalomia*, 851 F.Supp. 606, 613 (D.N.J.) (emphasis added), *aff'd without opinion*, 39 F.3d 1168 (3d Cir.1994). Where binding state precedent makes submitting those same constitutional issues to

a state forum futile, then a federal court should not decline to exercise its jurisdiction. *Tolbert v. City of Memphis,* 568 F.Supp. 1285, 1289-90 (W.D.Tenn.1983); *See also Mastin v. Fellerhoff,* 526 F.Supp. 969, 971 (S.D.Ohio 1981); *McKinstry v. Genesee County Circuit,* 669 F.Supp. 801, 805-06 (E.D.Mich.1987).

The doctrine of abstention established in *Younger* is predicated upon the belief that state courts are equally capable of adjudicating federal constitutional issues in cases before them. *Younger,* 401 U.S. at 44, 91 S.Ct. at 750-51. However, abstention was not intended to create a regime whereby a federal court would be effectively bound by state court precedent regarding the U.S. Constitution.

The New Jersey Supreme Court has already ruled in *Doe* and rejected the *ex post facto* and double jeopardy challenges to Megan's Law[4]. *Doe,* 142 N.J. at 40-77, 662 A.2d 367. The state courts involved in the plaintiffs' proceedings are all bound by the decision of the New Jersey Supreme Court. The ineffectiveness of raising the present constitutional issues in those proceedings under Megan's Law has been made patently clear by the New Jersey Appellate Division in *In the Matter of G.B.,* 286 N.J.Super. 396, 669 A.2d 303 (App.Div.1996). The panel of the Appellate Division which has been assigned to hear all Megan's Law appeals stated:

> "We need not address registrant's constitutional arguments. The Supreme Court in Doe rejected these arguments."

Id. at 7. The *ex post facto* and double jeopardy arguments which

4. As discussed in Section II, *supra,* this case does not constitute a review of the findings of the *Doe* Court.

G.B. raised in that case and which the plaintiffs raise here will not, as a practical matter, receive any meaningful review in a New Jersey court.

If *Younger* is predicated solely upon a technical ability to raise constitutional arguments, then this Court must abstain. *See, e.g. Dubinka,* 23 F.3d at 224. However, if *Younger* recognizes the actual ability to secure the protection of constitutional rights, then there must be a realistic opportunity to deal with the merits of a constitutional claim in either forum. Otherwise, claimants' rights would only be protected if they are in the extremely small minority of cases which are granted *certiorari* by the United States Supreme Court. Given the existence of *Doe* and the pronouncement of the Appellate Division panel which would hear any appeal by the plaintiffs, to abstain in this case would be to value the form of the constitutional claim over the substance of the constitutional right.[5]

Finally, abstention would be inappropriate under either construction of *Younger* as this case falls within an exception to the doctrine. A federal court should not abstain "under extraordinary circumstances where the danger of irreparable loss is both great and immediate." *Younger,* 401 U.S. at 45, 91 S.Ct. at 751. This serves to heighten the standard preliminary injunction analysis which merely requires some showing of irreparable harm. *Id.*

In the instant action the plaintiffs face imminent Tier II and

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5. The absence of a realistic opportunity for plaintiffs to litigate their constitutional claims in state classification proceedings distinguishes the case at bar from *Wilton v. Seven Falls,* __ U.S. __, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995). Furthermore, *Wilton* holds that the decision to entertain or dismiss a declaratory judgment action under 28 U.S.C. § 2201 is left to the trial court's discretion.

Tier III notification. This could encompass the distribution of their names, addresses, descriptions, photographs, automobile descriptions, license plate numbers, and places of employment to those living near the plaintiffs' homes or jobs. (*See e.g. R.T. v. Poritz*). Even without considering the potential to incite vigilante activity, dissemination of this information could severely disrupt the lives of the plaintiffs and reduce their ability to maintain gainful employment. *See e.g.* Susan Edelman, *Megan's Law Ricochets,* The Bergen Record, Feb. 2., 1996 (Compl., Exh. D). Such a harm is not only irreparable, but is clearly both "great and immediate" as contemplated by *Younger*. Therefore this Court should not abstain from exercising its jurisdiction.[6]

IV. Preliminary Injunction

Much of the Court's analysis in this area has previously been elaborated in its oral opinion of January 26, 1996 in this case. The Court reiterates and incorporates those determinations by reference. However, a brief review is also warranted.

A. Standard for Preliminary Injunction

The Third Circuit standard governing a preliminary injunction is as follows:

> In considering a motion for preliminary injunctive relief, a court must carefully weigh four factors: (1) whether the movant has shown a reasonable probability

6. At oral argument, the Court's attention was directed for the first time herein to the federal anti-injunction act, 28 U.S.C. § 2283. Because the applicability of that statute to the case at bar is not presently certain, the Court will address that issue if and when it is presented in a subsequent motion.

> of success on the merits; (2) whether the movant will be irreparably injured by denial of such relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting preliminary relief will be in the public interest.

SI Handling Systems, Inc. v. Heisley, 753 F.2d 1244, 1254 (3d Cir.1985); *see also Hoxworth v. Blinder, Robinson & Co., Inc.,* 903 F.2d 186, 197-198 (3d Cir.1990); *Klitzman, Klitzman and Gallagher v. Krut,* 744 F.2d 955, 958- 959 (3d Cir.1984); *Continental Group v. Amoco Chemicals Corp.,* 614 F.2d 351, 356-57 (3d Cir.1980). Preserving the status quo of an action pending final determination is the primary purpose of a preliminary injunction. *In re Arthur Treacher's Franchisee Litigation,* 689 F.2d 1150 (3d Cir.1982). A plaintiff must establish both items (1) and (2) above in order to obtain a preliminary injunction. *Morton v. Beyer,* 822 F.2d 364, 367 (3d Cir.1987).

B. Reasonable Likelihood of Success on the Merits

In order to obtain a preliminary injunction, plaintiffs must show a reasonable likelihood of success on the merits. In this case, this standard is judged not only in light of this Court's interpretation of the law, but on the nature of *stare decisis.* The claims put forth by the plaintiffs with regard to the *ex post facto* and double jeopardy claims are substantially identical to those advanced by the plaintiff in *Artway v. Attorney General of New Jersey,* 876 F.Supp. 666 (D.N.J.1995). In fact those arguments have been expressly adopted by the plaintiffs. (Plaintiffs' Br. at 10).

In *Artway* Judge Politan found Megan's Law to be unconstitutional on ex post facto grounds. *Artway,* 876 F.Supp.

at 692. This case was argued before the Third Circuit last Fall and an opinion is forthcoming in the near future. Given *Artway*, it is reasonably likely that the plaintiffs will succeed on the merits; not only because of the strength of their constitutional claims, but also because this Court may have binding precedent to follow with regard to adjudicating them.

C. Irreparable Harm

As has already been discussed in Section III, *supra*, the plaintiffs have more than met the showing of irreparable harm necessary to obtain preliminary injunctive relief.

D. Balance of Harms

Although the goal of Megan's Law, the protection of the public from sexual offenders, is undeniably important, the defendants will not be appreciably harmed in the near future. Proceedings before the courts of the State of New Jersey leading to final tier classifications may proceed uninterrupted by any preliminary injunction here. Only community notification at either the Tier II or Tier III levels is being restrained. The police should be notified immediately, both under the Tier I provisions of Megan's Law and under the terms of the injunction, regarding the whereabouts of the plaintiffs. Defendants have also made no showing that any of the plaintiffs pose a specific threat beyond the general statistical likelihood of recidivism for sexual offenders.[7] Coupled with the limited time frame of the injunction, this should minimize any negative impact on the defendants.

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7. *See W.S. v. Poritz*, Civil Action No. 96-491, slip op. at 13 (D.N.J. Feb. 15, 1996).

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E. Public Interest

The public has a profound interest in protecting the potential victims of sexual offenders. However the public has an equally vital concern that the rights which all persons enjoy under our Constitution be fully protected. As Judge Politan stated in *Artway:*

> While the Court recognizes the broad powers of the legislature in protecting the health, safety, and welfare of citizens, it must not lose sight of its judicial function even in the face of public outcry. It is this Court's function and responsibility to protect the constitutional rights of the minority or the individual. That role and task becomes most immediate and onerous in situations where legislatures encroach individual constitutional rights in the name of the common good. Plaintiff contends that Megan's Law presents such a crisis.

876 F.Supp. at 685. From the foregoing discussion it is apparent that only by entering the present preliminary injunction can this Court preserve the *status quo* and adequately protect both of these societal values.

The injunction will be entered in the form and scope previously employed in this case. However, the alternative fixed date of April 19, 1996 has been removed. While such a date was relevant for a temporary restraining order, it is much less material for the preliminary injunction in this case. The re- examination of all aspects of this action can only take place when the Third Circuit's decision in *Artway* is released, in the near future. Furthermore, all parties are protected by the provisions of this Court's Order which permits a motion for modification or other relief upon five business days' notice.

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CONCLUSION

For the reasons stated above, the motion of the plaintiffs to certify a class is granted, and their motion for preliminary injunctive relief is also granted.

ORDER CERTIFYING A PLAINTIFF CLASS AND CONTINUING PRELIMINARY INJUNCTION

This matter having been opened to the Court by Michael Buncher, Esquire, Special Hearings Unit, Office of the Public Defender, attorney for plaintiffs and in the presence of Rhonda S. Berliner-Gold, Deputy Attorney General appearing on behalf of defendant Deborah Poritz, Attorney General, State of New Jersey; and in the presence of representatives of the proposed co-defendant County Prosecutors; and based upon the papers considered and oral argument being heard, and for good cause shown,

It is on this 14th day of March, 1996, **ORDERED** that:

1. The caption in this matter is hereby amended to read as set forth above, and any pleadings or other papers filed or served hereafter shall employ the caption stated above, except that the defendants may hereafter be referred to as Deborah Poritz, et al.;

2. This Order amends and supersedes the terms of prior injunctive Orders entered in this action;

3. A class is hereby certified pursuant to Fed.R.Civ.P. 23(a) and (b)(2) which consists of:

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All persons required to register as sex offenders pursuant to N.J.S.A. 2C:7-1 et seq. whose offenses were committed prior to October 31, 1994, the effective date of the New Jersey Registration and Community Notification Laws, and who have been or will be classified as tier II or tier III offenders;

4. No formal notice to members of the class as contemplated by Fed.R.Civ.P. 23 shall issue at this time;

5. Leave is granted to plaintiffs to file a Second Amended Complaint which, *inter alia*, joins each of the County Prosecutors of the State of New Jersey as defendants;

6. The defendants, their officers, agents, servants, employees and attorneys, those persons under their general supervision, and all persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, shall be restrained and enjoined from issuing or disseminating in any manner Tier II or Tier III notifications regarding members of the Class under N.J.S.A. 2C:7-1 *et seq.* (Megan's Law) during the pendency of this Preliminary Injunction;

7. Tier I notice may be given within seven days of the date of this Order for any member of the Class;

8. Defendants are not hereby restrained from proceeding with conferences and hearings before the Courts of the State of New Jersey, pursuant to Megan's Law, which may proceed to the point of final determination of the tier designation and manner of community notification for any member of the plaintiff Class;

9. Civil Action No. 95-98 (*R.T. v. Christine Todd Whitman at al.*) be and hereby is consolidated with the within action, the plaintiff therein is declared to be a member of the plaintiff Class, this Court's Orders of January 2, 1996 and February 26, 1996 in that action be and the same hereby are vacated, plaintiff R.T. is entitled to all the relief afforded to Class members in the present Order, and the $100 security posted in Civil Action No. 95-98 shall be treated hereafter as additional security in the case at bar;

10. The amount of $100 posted by the plaintiffs with the Clerk of the District Court, pursuant to Fed.R.Civ.P. 65(c), as security herein shall remain with the Clerk as security for this Preliminary Injunction;

11. This Preliminary Injunction shall expire 10 days from and after a decision by the United States Court of Appeals for the Third Circuit in the matter of *Artway v. Attorney General of New Jersey, et al.*, 81 F.3d 1235 (3rd Cir.1996);

12. Upon five business days notice, any party may move either to extend, modify, terminate or vacate any provision of this Order or to seek a dismissal of this action upon any ground, including any alleged absence of jurisdiction or power of this Court to grant relief to plaintiffs;

13. This Preliminary Injunction is immediately effective as of 4:00 p.m. on March 13, 1996;

14. This Order and the Opinion filed in conjunction therewith shall not be filed under seal; however all other papers heretofore and hereafter filed in this matter shall remain and be under seal until further Order of the Court;

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15. The entry of this Preliminary Injunction is immediately appealable by any party;

16. The defendant's oral motion for a stay of this Order pending appeal is denied.

APPENDIX J — MEGAN'S LAW

NEW JERSEY STATUTES ANNOTATED
TITLE 2C. THE NEW JERSEY CODE OF CRIMINAL JUSTICE
SUBTITLE 1. GENERAL PROVISIONS
CHAPTER 7. REGISTRATION AND NOTIFICATION OF RELEASE OF CERTAIN OFFENDERS

Current through L.1996, c. 118, apv. 9/16/96.

N.J.S.A. 2C:7-1. Legislative findings and declaration

The Legislature finds and declares:

a. The danger of recidivism posed by sex offenders and offenders who commit other predatory acts against children, and the dangers posed by persons who prey on others as a result of mental illness, require a system of registration that will permit law enforcement officials to identify and alert the public when necessary for the public safety.

b. A system of registration of sex offenders and offenders who commit other predatory acts against children will provide law enforcement with additional information critical to preventing and promptly resolving incidents involving sexual abuse and missing persons.

Appendix J

N.J.S.A. 2C:7-2. Registration of sex offenders; definitions

a. A person who has been convicted, adjudicated delinquent or found not guilty by reason of insanity for commission of a sex offense as defined in subsection b. of this section shall register as provided in subsections c. and d. of this section. A person who fails to register as required under this act shall be guilty of a crime of the fourth degree.

b. For the purposes of this act a sex offense shall include the following:

(1) Aggravated sexual assault, sexual assault, aggravated criminal sexual contact, kidnapping pursuant to paragraph (2) of subsection c. of N.J.S. 2C:13-1 or an attempt to commit any of these crimes if the court found that the offender's conduct was characterized by a pattern of repetitive, compulsive behavior, regardless of the date of the commission of the offense or the date of conviction;

(2) A conviction, adjudication of delinquency, or acquittal by reason of insanity for aggravated sexual assault; sexual assault; aggravated criminal sexual contact; kidnapping pursuant to paragraph (2) of subsection c. of N.J.S. 2C:13-1; endangering the welfare of a child by engaging in sexual conduct which would impair or debauch the morals of the child pursuant to subsection a. of N.J.S. 2C:24-4; endangering the welfare of a child pursuant to paragraph (4) of subsection b. of N.J.S. 2C:24-4; luring

or enticing pursuant to section 1 of P.L.1993, c. 291 (C. 2C:13-6); criminal sexual contact pursuant to N.J.S. 2C:14-3b. If the victim is a minor; kidnapping pursuant to N.J.S. 2C:13-1, criminal restraint pursuant to N.J.S. 2C:13-2, or false imprisonment pursuant to N.J.S. 2C:13-3 if the victim is a minor and the offender is not the parent of the victim; or an attempt to commit any of these enumerated offenses if the conviction, adjudication of delinquency or acquittal by reason of insanity is entered on or after the effective date of this act or the offender is serving a sentence of incarceration, probation, parole or other form of community supervision as a result of the offense or is confined following acquittal by reason of insanity or as a result of civil commitment on the effective date of this act;

(3) A conviction, adjudication of delinquency or acquittal by reason of insanity for an offense similar to any offense enumerated in paragraph (2) or a sentence on the basis of criteria similar to the criteria set forth in paragraph (1) of this subsection entered or imposed under the laws of the United States, this State or another state.

c. A person required to register under the provisions of this act shall do so on forms to be provided by the designated registering agency as follows:

(1) A person who is required to register and who is under supervision in the community on probation, parole, furlough, work release, or a similar program,

shall register at the time the person is placed under supervision or no later than 120 days after the effective date of this act, whichever is later, in accordance with procedures established by the Department of Corrections, the Department of Human Services, the Juvenile Justice Commission established pursuant to section 2 of P.L.1995, c. 284 (C. 52: 17B-170) or the Administrative Office of the Courts, whichever is responsible for supervision;

(2) A person confined in a correctional or juvenile facility or involuntarily committed who is required to register shall register prior to release in accordance with procedures established by the Department of Corrections, the Department of Human Services or the Juvenile Justice Commission;

(3) A person moving to or returning to this State from another jurisdiction shall register with the chief law enforcement officer of the municipality in which the person will reside or, if the municipality does not have a local police force, the Superintendent of State Police within 120 days of the effective date of this act or 70 days of first residing in or returning to a municipality in this State, whichever is later;

(4) A person required to register on the basis of a conviction prior to the effective date who is not confined or under supervision on the effective date of this act shall register within 120 days of the effective date of this act with the chief law enforcement officer of the municipality in which the person will reside or, if the municipality does not have a local police force, the Superintendent of State Police.

d. Upon a change of address, a person shall notify the law enforcement agency with which the person is registered and must re-register with the appropriate law enforcement agency no less than 10 days before he intends to first reside at his new address.

e. A person required to register under paragraph (1) of subsection b. of this section or under paragraph (3) of subsection b. due to a sentence imposed on the basis of criteria similar to the criteria set forth in paragraph (1) of subsection b. shall verify his address with the appropriate law enforcement agency every 90 days in a manner prescribed by the Attorney General. A person required to register under paragraph (2) of subsection b. of this section or under paragraph (3) of subsection b. on the basis of a conviction for an offense similar to an offense enumerated in paragraph (2) of subsection b. shall verify his address annually in a manner prescribed by the Attorney General. One year after the effective date of this act, the Attorney General shall review, evaluate and, if warranted, modify pursuant to the "Administrative Procedure Act," P.L.1968, c. 410 (C. 52:14B-1 et seq.) the verification requirement.

f. A person required to register under this act may make application to the Superior Court of this State to terminate the obligation upon proof that the person has not committed an offense within 15 years following conviction or release from a correctional facility for any term of imprisonment imposed, whichever is later, and is not likely to pose a threat to the safety of others.

Appendix J

N.J.S.A. 2C:7-3. Notice of the obligation to register shall be provided as follows:

(1) A court imposing a sentence, disposition or order of commitment following acquittal by reason of insanity shall notify the defendant of the obligation to register pursuant to section 2 of this act.[1]

(2) The Department of Corrections, the Administrative Office of the Courts, the Juvenile Justice Commission established pursuant to section 2 of P.L.1995, c. 284 (C. 52:17B-170) and the Department of Human Services shall (a) establish procedures for notifying persons under their supervision of the obligation to register pursuant to this act and (b) establish procedures for registration by persons with the appropriate law enforcement agency who are under supervision in the community on probation, parole, furlough, work release or similar program outside the facility, and registration with the appropriate law enforcement agency of persons who are released from the facility in which they are confined without supervision.

(3) The Division of Motor Vehicles in the Department of Law and Public Safety shall provide notice of the obligation to register pursuant to this section in connection with each application for a license to operate a motor vehicle and each application for an identification card issued pursuant to section 2 of P.L.1980, c. 47 (C. 39:3-29.3).

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1. Section 2C:7-2.

Appendix J

(4) The Attorney General shall cause notice of the obligation to register to be published in a manner reasonably calculated to reach the general public within 30 days of the effective date of this act.

Appendix J

N.J.S.A. 2C:7-4. Registration forms; contents; transmission of form

a. Within 60 days of the effective date of this act, the Superintendent of State Police, with the approval of the Attorney General, shall prepare the form of registration statement as required in subsection b. of this section and shall provide such forms to each organized full-time municipal police department, the Department of Corrections, the Administrative Office of the Courts and the Department of Human Services. In addition, the Superintendent of State Police shall make such forms available to the Juvenile Justice Commission established pursuant to section 2 of P.L.1995, c. 284 (C. 52:17B-170).

b. The form of registration required by this act shall include:

(1) A statement in writing signed by the person required to register acknowledging that the person has been advised of the duty to register and reregister imposed by this act and including the person's name, social security number, age, race, sex, date of birth, height, weight, hair and eye color, address of legal residence, address of any current temporary residence, date and place of employment;

(2) Date and place of each conviction, adjudication or acquittal by reason of insanity, indictment number, fingerprints, and a brief description of the crime or crimes for which registration is required, and

(3) Any other information that the Attorney General deems necessary to assess risk of future commission of a crime, including criminal and corrections records, nonprivileged personnel, treatment, and abuse registry records, and evidentiary genetic markers when available.

c. Within three days of receipt of a registration pursuant to subsection c. of section 2 of this act,[1] the registering agency shall forward the statement and any other required information to the prosecutor who shall, as soon as practicable, transmit the form of registration to the Superintendent of State Police, and, if the registrant will reside in a different county, to the prosecutor of the county in which the person will reside. The prosecutor of the county in which the person will reside shall transmit the form of registration to the law enforcement agency responsible for the municipality in which the person will reside and other appropriate law enforcement agencies. The superintendent shall promptly transmit the conviction data and fingerprints to the Federal Bureau of Investigation.

d. The Superintendent of State Police shall maintain a central registry of registrations provided pursuant to this act.

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1. Section 2C:7-2.

Appendix J

N.J.S.A. 2C:7-5. Records; access, immunity

a. Records maintained pursuant to this act shall be open to any law enforcement agency in this State, the United States or any other state. Law enforcement agencies in this State shall be authorized to release relevant and necessary information regarding sex offenders to the public when the release of the information is necessary for public protection in accordance with the provisions of P.L.1994, c. 128 (C. 2C:7-6 et seq.).

b. An elected public official, public employee, or public agency is immune from civil liability for damages for any discretionary decision to release relevant and necessary information, unless it is shown that the official, employee, or agency acted with gross negligence or in bad faith. The immunity provided under this section applies to the release of relevant information to other employees or officials or to the general public.

c. Nothing in this act shall be deemed to impose any liability upon or to give rise to a cause of action against any public official, public employee, or public agency for failing to release information as authorized in subsection d. of this section.

d. Nothing in this section shall be construed to prevent law enforcement officers from notifying members of the public exposed to danger of any persons that pose a danger under circumstances that are not enumerated in this act.

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N.J.S.A. 2C:7-6. Notification of community of intent of sex offender released from correctional facility or adjudicated delinquent to reside in municipality

Within 45 days after receiving notification pursuant to section 1 of P.L.1994, c. 135 (C. 30:4-123.53a) that an inmate convicted of or adjudicated delinquent for a sex offense as defined in section 2 of P.L.1994 c. 133 (C. 2C:7-2) is to be released from incarceration and after receipt of registration as required therein, the chief law enforcement officer of the municipality where the inmate intends to reside shall provide notification in accordance with the provisions of section 3 of this act[1] of that inmate's release to the community. If the municipality does not have a police force, the Superintendent of State Police shall provide notification.

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1. Section 2C:7-8.

Appendix J

N.J.S.A. 2C:7-7. Chief law enforcement officer to provide notification to community

After receipt of notification and registration pursuant to P.L.1994, c. 133 (C. 2C:7-1 et seq.) that a person required to register pursuant to that act intends to change his address, the chief law enforcement officer of the municipality to which the person is relocating shall provide notification of that relocation to the community pursuant to section 3 of this act.[1] If the municipality does not have a police force, the Superintendent of State Police shall provide notification.

1. Section 2C:7-8.

Appendix J

N.J.S.A. 2C:7-8. Notification guidelines; identification of factors relevant to risk of re-offense

a. After consultation with members of the advisory council established pursuant to section 6 of this act[1] and within 60 days of the effective date, the Attorney General shall promulgate guidelines and procedures for the notification required pursuant to the provisions of this act. The guidelines shall identify factors relevant to risk of re-offense and shall provide for three levels of notification depending upon the degree of the risk of re-offense.

b. Factors relevant to risk of re-offense shall include, but not be limited to, the following:

(1) Conditions of release that minimize risk of re-offense, including but not limited to whether the offender is under supervision of probation or parole; receiving counseling, therapy or treatment; or residing in a home situation that provides guidance and supervision;

(2) Physical conditions that minimize risk of re-offense, including but not limited to advanced age or debilitating illness;

(3) Criminal history factors indicative of high risk of re-offense, including:

(a) Whether the offender's conduct was found to be characterized by repetitive and compulsive behavior;

1. Section 2C:7-11.

(b) Whether the offender served the maximum term;

(c) Whether the offender committed the sex offense against a child;

(4) Other criminal history factors to be considered in determining risk, including:

(a) The relationship between the offender and the victim;

(b) Whether the offense involved the use of a weapon, violence, or infliction of serious bodily injury;

(c) The number, date and nature of prior offenses;

(5) Whether psychological or psychiatric profiles indicate a risk of recidivism;

(6) The offender's response to treatment;

(7) Recent behavior, including behavior while confined or while under supervision in the community as well as behavior in the community following service of sentence; and

(8) Recent threats against persons or expressions of intent to commit additional crimes.

c. The regulations shall provide for three levels of notification depending upon the risk of reoffense by the offender as follows:

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(1) If risk of re-offense is low, law enforcement agencies likely to encounter the person registered shall be notified;

(2) If risk of re-offense is moderate, organizations in the community including schools, religious and youth organizations shall be notified in accordance with the Attorney General's guidelines, in addition to the notice required by paragraph (1) of this subsection;

(3) If risk of re-offense is high, the public shall be notified through means in accordance with the Attorney General's guidelines designed to reach members of the public likely to encounter the person registered, in addition to the notice required by paragraphs (1) and (2) of this subsection.

d. In order to promote uniform application of the notification guidelines required by this section, the Attorney General shall develop procedures for evaluation of the risk of reoffense and implementation of community notification. These procedures shall require, but not be limited to, the following:

(1) The county prosecutor of the county where the person was convicted and the county prosecutor of the county where the registered person will reside, together with any law enforcement officials that either deems appropriate, shall assess the risk of re-offense by the registered person;

(2) The county prosecutor of the county in which the registered person will reside, after consultation

with local law enforcement officials, shall determine the means of providing notification.

e. The Attorney General's guidelines shall provide for the manner in which records of notification provided pursuant to this act shall be maintained and disclosed.

Appendix J

N.J.S.A. 2C:7-9. Immunity from civil and criminal liability for providing or failing to provide relevant information

Notwithstanding any other provision of law to the contrary, any person who provides or fails to provide information relevant to the procedures set forth in this act shall not be liable in any civil or criminal action. Nothing herein shall be deemed to grant any such immunity to any person for his willful or wanton act of commission or omission.

Appendix J

N.J.S.A. 2C:7-10. Notification concerning other dangerous circumstances unaffected

Nothing in this act shall be construed to prevent law enforcement officers from providing community notification concerning any person who poses a danger under circumstances that are not provided for in this act.

Appendix J

N.J.S.A. 2C:7-11. Notification advisory council established; qualifications of members

A notification advisory council is established to consult with and provide recommendations to the Attorney General concerning the guidelines to be promulgated pursuant to section 3 of this act.[1] The council shall consist of 12 persons who, by experience or training, have a personal interest or professional expertise in law enforcement, crime prevention, victim advocacy, criminology, psychology, parole, public education or community relations. The members of the council shall be appointed in the following manner: four shall be appointed by the Governor, of whom no more than two shall be of the same political party; four shall be appointed by the President of the Senate, of whom no more than two shall be of the same political party; and four shall be appointed by the Speaker of the General Assembly, of whom no more than two shall be of the same political party. Any vacancies occurring in the membership shall be filled in the same manner as the original appointments.

One year after the effective date of this act, the Attorney General and the council shall conduct a comprehensive review of the guidelines to determine whether any changes or revisions should be promulgated. Upon completion of that review and the submission of any recommendations thereon, the council shall expire.

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1. Section 2C:7-8.

Supreme Court, U.S.
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(2)

No. 97-887

In the

Supreme Court of the United States

October Term, 1997

W.P., *et al.*, Individually and as Representatives of a Class Pursuant to Fed.R.Civ.P. 23(a) and 23(b)(2),

Petitioner,

v.

PETER VERNIERO, Attorney General of New Jersey, *et al.*,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

PETER VERNIERO
Attorney General of New Jersey
Counsel of Record
Hughes Justice Complex
25 Market Street
Trenton, New Jersey 08625
(609) 292-4925

JOSEPH L. YANNOTTI
Assistant Attorney General

RHONDA S. BERLINER-GOLD
B. STEPHAN FINKEL
Deputy Attorneys General
On the Brief

Attorney for Respondent

19 pp

QUESTIONS PRESENTED

1. Whether the Court's decision in *Hudson v. United States*, __ U.S. __, 1997 WL 756641 (U.S. 1997), provides sufficient guidance with respect to the test to determine whether a civil measure imposes punishment for purposes of the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution.

2. Whether the court of appeals correctly affirmed the district court's decision that the community notification provisions of New Jersey's "Megan's Law" do not impose punishment and, therefore, do not violate the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution.

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STATEMENT OF THE CASE

Respondent, the Attorney General of New Jersey, opposes the petition for a writ of *certiorari* seeking further review of a decision of the United States Court of Appeals for the Third Circuit in *E.B. v. Verniero*, 119 F.3d. 1077, 1087 (3d Cir. 1997),[1] which upheld the constitutionality of the sex offender community notification requirements of New Jersey's "Megan's Law."[2] In *E.B.*, the court of appeals held, in a 2-1 decision, that the community notification provisions of Megan's Law do not violate the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution. Petitioners, a class of convicted sex offenders required to register and subject to notification pursuant to Megan's Law who committed predicate sex offenses prior to the effective date of the law, urge this Court's exercise of jurisdiction but offer no reasons of sufficient moment to justify further review of the conclusion reached below. Further review of the ex post facto and double jeopardy holdings of the *E.B.* decision is unnecessary, apart from any benefit that would result from affirming the judgment below, thereby establishing as a matter of nationwide precedent the correctness of the Third Circuit's holding.

Respondent relies upon the extensive review of the background, details and operation of the Megan's Law community notification scheme set forth in the *E.B.* opinion (*id.* at 1081-90; App. B at 6a-29a), supplemented as follows. The New Jersey Legislature enacted Megan's Law to address

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[1] The decision of the court of appeals is reprinted in Appendix B to the petition for *certiorari*. All subsequent references to this case will include citations to both the reported case and petitioners' appendix.

[2] Petitioners were partially successful on their challenge based upon the Due Process Clause and do not seek further review of that claim. Respondent is filing a conditional cross-petition seeking review of the due process holding in the event the Court grants this petition.

the "danger of recidivism posed by sex offenders and others who have committed predatory acts against children, and the dangers posed by persons who prey on others as a result of mental illness." N.J. Stat. Ann. § 2C:7-1(a). Megan's Law established a system of registration of sex offenders and offenders who commit other predatory acts against children, N.J. Stat. Ann. § 2C:7-1(b), and a notification program in which the scope of notice is calibrated to the comparative risk of reoffense posed by the individual registered offender. *E.B.*, *supra*, 119 F.3d at 1083; App. B at 10a. Under the three-tiered notification program, where the risk of reoffense is comparatively low (Tier 1 notification), dissemination of notice is limited to law enforcement authorities; where the risk of reoffense is moderate (Tier 2 notification), institutions and organizations having the responsibility to care for and supervise children and women and which are likely to encounter the offender also receive notice; and where the risk of reoffense is high (Tier 3 notification), those members of the public likely to encounter the offender are also notified. *Ibid.*

The court of appeals reviewed the statutory scheme, and affirmed the district court's decision holding that the notification provided under Megan's Law does not constitute punishment under the Ex Post Facto and Double Jeopardy Clauses. *See W.P. v. Poritz*, 931 F. Supp. 1199 (D.N.J. 1996), *aff'd in part, rev'd in part sub nom.*, *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997); App. H, 133a-186a. In reaching this conclusion, the court of appeals utilized the three-prong test for punishment devised in *Artway v. Attorney General*, 81 F.3d 1235 (3d Cir. 1996), the application of which is informed by this Court's decision in *Hendricks v. Kansas*, __ U.S. __, 117 S.Ct. 2072 (1997). The resultant test led the court to consider whether the stated legislative purpose underlying the law was remedial and to examine whether the objective purpose or the effects of the law are sufficiently punitive to overcome a presumption

favoring the legislative judgment. *E.B.*, *supra*, 119 F.3d at 1096; App. B. at 44a.

The court of appeals, which had already found a remedial legislative purpose underlying the registration law, *see Artway*, *supra*, 81 F.3d at 1264, reached a similar conclusion with respect to the Legislature's declared purpose in enacting the community notification law, "which is remedial and devoid of any indication of an intent to punish." *E.B.*, *supra*, 119 F.3d at 1097; App. B at 45a-47a.

In evaluating whether the "objective purpose" of community notification is to punish, the court of appeals determined that "Tier 2 and 3 dissemination of information beyond law enforcement personnel is reasonably related to the nonpunitive goals of Megan's Law." *Id.* at 1098; App. B at 48a. The court of appeals further found that the remedial goals of community notification "have not been pursued in a way that has imposed a burden on registrants that clearly exceeds the burden inherent in accomplishment of the goals" and held that the statutory scheme is a permissible "measured response" to the identified problem. *Ibid.*; App. B at 49a.

The court rejected the tendered historical analogy of community notification to colonial punishments such as public shaming and banishment, noting that "[d]issemination of information about criminal activity ... has never been regarded as punishment when done in furtherance of a legitimate governmental interest." *Id.* at 1099; App. B at 53a. The court concluded that, "[b]ecause the closest analogies have not historically been regarded as punishment ... historical precedent does not demonstrate an objective punitive purpose." *Id.* at 1101; App. B at 56a.

The court also rejected the contention that the effects of community notification are so severe that the measure imposes unconstitutional punishment even though no actual

or objective punitive purpose is shown. *Id.* at 1101-04; App. B at 56a-65a. The court recognized that, while notification may extend the duration of society's response to an offender who commits a reprehensible crime and is publicly prosecuted, the effect is not "sufficiently burdensome to require classification of the law as punitive." *Id.* at 1104; App. B at 65a. Accordingly, the court held that "the notification required by Megan's Law does not constitute punishment for purposes of the Ex Post Facto and Double Jeopardy Clauses." *Id.* at 1105; App. B at 65a.

The Third Circuit's decision is entirely consistent with that of the Supreme Court of New Jersey in *Doe v. Poritz*, 662 A.2d 367 (N.J. 1995) on identical punishment issues in a state court challenge to the same community notification law. In addition, the *E.B.* decision coincides with the rulings of the United States Court of Appeals for the Second Circuit, *Roe v. Office of Adult Probation*, 125 F.3d 47 (2d Cir. 1997) and *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997), and the United States Court of Appeals for the Ninth Circuit, *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997). Indeed, no federal circuit court has issued a contrary ruling on the question of whether sex offender community notification constitutes punishment in violation of the Ex Post Facto and Double Jeopardy Clauses.

REASONS FOR DENYING THE WRIT

I. This Court's Decision in *Hudson v. United States* Renders Unnecessary Review of this Case for Purposes of Clarifying the Proper Test for Determining Whether a Civil Measure Constitutes Punishment for Purposes of the Ex Post Facto and Double Jeopardy Clauses.

Petitioners invite the Court to use this case as a vehicle to resolve the doctrinal "inconsistency" between this Court's decision in *United States v. Halper*, 490 U.S. 435 (1989), and its subsequent rulings in *United States v. Ursery*, __ U.S. __, 116 S.Ct. 2135 (1997), and *Kansas v. Hendricks*, *supra*. The decision in *Hudson v. United States*, handed down during the pendency of this petition, renders petitioners' invitation superfluous.

Hudson lays to rest any doubts over the applicable analysis for determining whether a civil measure constitutes punishment, expressly disavowing the method of analysis used in *United States v. Halper*, *supra*, and reaffirming the previously established rule illustrated in *United States v. Ward*, 448 U.S. 242 (1980). *Hudson*, *supra*, 1997 WL 756641 at *2-*6. The *Hudson* decision forecloses further proliferation of the type of "novel double jeopardy claims spawned in the wake of *Halper*" (explicitly citing the petitioners' challenge in *E.B.* as an exemplar). *Hudson*, *supra*, 1997 WL 756641 at *4, n.4. *Hudson* also expressly delineates the degree of deference to be accorded to legislative intent, and reaffirms the application of the *Mendoza-Martinez* factors. *Id.* at *4-*5, *citing Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). There appears to be no necessity for further explication on this jurisprudential issue, either with respect to its direct implications for the *E.B.* decision and other challenges to sex offender community notification laws or in the broader context of ex post facto and double jeopardy jurisprudence.

II. There is Uniformity between the *E.B.* Decision and the Decisions of Other Tribunals.

Petitioners candidly acknowledge the decisional uniformity among the United States Courts of Appeals for Second, Third and Ninth Circuits in holding that the respective community notification laws of New York and Connecticut, New Jersey, and Washington state, do not impose punishment for ex post facto and double jeopardy purposes. However, petitioners posit a split in authority based upon the decision of the Supreme Court of Kansas in *State v. Myers*, 923 P.2d 1024 (Kan. 1996), *cert. denied*, __ U.S. __, 117 S.Ct. 2508 (1997).

Contrary to petitioners' suggestion, the *Myers* case, which was decided prior to this Court's decision in *Hendricks*, is easily reconciled with the *E.B.* decision. *Myers* does not stand for the proposition that community notification laws such as New Jersey's Megan's Law are punishment. In *Myers*, Kansas' highest court found the registration requirements of the Kansas Sex Offender Registration Act ("KSORA") to be remedial and therefore constitutional, but struck down on ex post facto grounds the public disclosure provision of the law, which the court deemed excessive "beyond the degree necessary to promote public safety." *Id.* at 1043. The *Myers* court reasoned that "KSORA places no restrictions on who is given access to the registered offender information or what that person does with the information." *Id.* at 1041. The court found a law which featured "unlimited public accessibility to the registered information and the lack of any initial individualized determination of the appropriateness and scope of disclosure" to be excessive and therefore punitive. *Id.* at 1044.

The *Myers* decision cannot be read as a blanket condemnation of sex offender community notification laws; in fact, review of the opinion supports the opposite conclusion. The *Myers* decision specifically contrasts the

unlimited public access of the KSORA disclosure provision with the "carefully tailored community notification" of New Jersey's community notification law. *Id.* at 1036. The Kansas Supreme Court opined that the Kansas law would avoid an ex post facto characterization if public access were "limited to those with a need to know the information for public safety purposes." *Id.* at 1043. New Jersey's approach limits the public disclosure of information, if authorized under the law, to persons and relevant organizations deemed "likely to encounter" a registrant with the scope of such notification calibrated to the relative risk of re-offense posed by the registrant based on an individualized risk assessment which is subject to judicial review. The Kansas court's express endorsement of the type of approach undertaken by New Jersey does not signal the existence of an irreconcilable split in authority which merits the attention of this Court.

III. The Court of Appeals Correctly Held that Community Notification under Megan's Law Does Not Impose Punishment.

The court of appeals fully considered and correctly decided the issues upon which petitioners seek further review. As such, review by this Court is not required in order to correct a legally deficient or erroneous decision below.

In conducting its punishment analysis, the majority followed the approach suggested by *Hendricks* and confirmed in *Hudson*, according substantial deference to the manifest remedial intent of the Legislature. There is no dispute over the court's finding that the Legislature's "declared purpose ... is remedial and devoid of an intent to punish." *Id.* at 1097; *see also id.* at 1113-14 (Becker, J., dissenting); App. B at 47a; 85a. Despite petitioners' suggestion that Megan's Law is the product of "unusual procedures" and therefore indicative of a punitive intent, the court of appeals found the context in which Megan's Law was enacted to be "entirely

consistent with its declared remedial purpose." *Id.* at 1096, App. B at 47a.

Prior to the Megan Kanka tragedy, the New Jersey Legislature had already undertaken consideration in that legislative session of the problems posed by sex offenders. The registration and community notification bills were included as part of a package of nine related bills which addressed a range of issues related to sex offenders and other types of offenders, including sentencing, community supervision, civil commitment, victims' rights and use of DNA databanks. *See* N.J. Pub. L. 1994, Chs. 127-136. The Senate Law and Public Safety Committee had previously held a hearing on victim notification, and had heard testimony and received written reports on issues related to sex offender registration and community notification. *E.B.*, *supra*, 119 F.3d at 1081, App. B, 7a-8a.

In its consideration of the Senate counterparts to the Assembly versions of the registration and community notification bills (which ultimately were enacted as part of the "Megan's Law" package), the Senate committee substantially revised the bills. *Ibid*; App. B at 8a. The amended versions of the bills passed the Senate on October 3, 1994. *Ibid.* The General Assembly debated and approved the revised bills on October 20, 1994, and the Governor signed the legislation into law on October 31, 1994. *Ibid.* These additional facts forcefully contradict the notion that the manner is which the law was enacted is indicative of a punitive legislative intent and confirm that the community notification law was the product of the proper operation of the legislative process, which was motivated by the desire to expeditiously address a significant public safety issue.

Upon finding the Legislature's manifest purpose to be "remedial and devoid of any indication of an intent to punish," the court declared it would "reject the legislature's

manifest intent only where a party challenging the statute provides the 'clearest proof' that 'the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Id.* at 1096, *citing Hendricks*, *supra*, 117 S.Ct. at 2082 (internal citations omitted); App. B at 43a. The court found that neither the proffered "Scarlet Letter" analogy nor the severity of the asserted effects of community notification, nor any of the other contentions petitioners raised, satisfied this requisite burden.

In rejecting petitioners' attempt to demonstrate a punitive intent by likening the carefully-tailored dissemination of largely-public information provided under Megan's Law to colonial era punishments such as public shaming, humiliation and banishment, the court noted that, in *United States v. Criden*, 648 F.2d 814 (3d Cir. 1981), it had rejected a similar analogy attempting to compare public dissemination of criminal trial information to such shaming punishments. *E.B.*, 119 F.3d at 1099-1101; App. B at 51a-52a. The court identified numerous fundamental differences between the measures, finding closer, more apt historical analogues in the various forms of warnings traditionally provided by the government to protect public safety, such as "armed and dangerous" warning posters and quarantine notices. *Id.* at 1100-01; App. B at 54a-55a.

The Second and Ninth Circuit Courts of Appeal have reached similar conclusions with respect to comparable historical arguments raised in constitutional challenges to sex offender community notification laws enacted in their respective jurisdictions. As Judge Newman opined, "[m]odern day community notification measures serve vastly different purposes than those served by these historical punishments, operate without the physical participation of the offender, and lack the general social significance accompanying traditional shaming and banishment penalties." *Roe v. Office of Adult Probation*, *supra*, 125 F.3d at 55 (upholding Connecticut notification policy); *see also Doe v.*

Pataki, *supra*, 120 F.3d at 1284 (rejecting historical analogy based on fundamental differences between community notification provisions of New York's sex offender registration act and colonial shaming penalties or banishment). The Ninth Circuit also found the colonial punishment analogy too tenuous to furnish the "clear proof" needed to overcome the non-punitive intent underlying the Washington State notification law, and stated that comparisons to "wanted" posters and warnings about escaped prisoners or other dangerous-person practices are "at least as appropriate" as the analogy to colonial shaming punishments. *Russell*, *supra*, 124 F.3d at 1091.

The Third Circuit also examined New Jersey's law for a contradictory punitive purpose evidenced in the design or effect of the law. The court found the registration and carefully tailored notification scheme to be "a measured response to the identified problem" of "possible re-abuse" by recidivist sex offenders, finding "a reasonable 'fit' between end and means." *E.B.*, *supra*, 119 F.3d at 1098; App. B at 48a, 49a. In so concluding, the court considered the salient features of the notification scheme, such as individualized risk assessment based on objective criteria which utilizes a standardized, uniform scale, limited public dissemination tailored to level of relative risk of re-offense (with 50% of those registrants evaluated classified as presenting a moderate risk of reoffense and only 5% of registrants determined to pose a high risk of reoffense, *id.* at 1098, meaning that notification to neighbors would not take place for 95% of the registrants evaluated, with no community notification taking place for nearly half of all registrants), and available judicial review of the proposed tier classification and notification plan.

Many other features of the notification scheme contradict any inference of a hidden punitive intent, such as the available override factors that may limit or even dispense with notification under appropriate circumstances, including,

for example, where an offender "demonstrates a physical condition that minimizes the risk of re-offense[.]" *E.B.*, *supra*, 119 F.3d at 1084, *citing Artway*, *supra*, 81 F.3d at 1244; *see also* N.J. Stat. Ann. § 2C:7-8(b)(2) (identifying as a factor relevant to the risk of re-offense "[p]hysical conditions that minimize risk of re-offense, including but not limited to advanced age or debilitating illness"). The Attorney General's Guidelines (promulgated as required by the community notification law, N.J. Stat. Ann. § 2C:7-8) also provide for discretionary notification "tailored to reach those members of the public who are at risk from the particular offender." *E.B.*, *supra*, 119 F.3d at 1085; App. B at 17a. By way of illustration, the court of appeals cited the example of an offender whose past victims are all members of the immediate family or the household, who the prosecutor may determine is not a risk requiring notice to community organizations or schools that would ordinarily receive notice for a Tier 2 offender, and would limit notification accordingly. *Ibid.*; App. B at 17a-18a. The availability of these options to customize notification further rebuts any assertion of an underlying punitive intent contrary to the Legislature's stated remedial purpose.

The court also correctly rejected the argument that the effects of community notification under Megan's Law are so onerous as to render the measure "punishment." It should also be noted that the Second and Ninth Circuit Courts reached the same conclusion with respect to the effects of the community notification laws enacted by the legislatures in those jurisdictions. *See Doe v. Pataki*, *supra*, 120 F.3d at 1280-81; *Russell v. Gregoire*, *supra*, 124 F.3d at 1092.

The *E.B.* court examined indirect effects related to community notification which would stem from possible reactions of individual citizens to the presence of a convicted sex offender in their community, which effects the court characterizes as injury to "reputational interests," including "isolation, harassment, loss of opportunities," and "exposure

to an increased risk of private violence." *E.B.*, *supra*, 119 F.3d at 1102; App. B at 59a.

The court weighed these effects in its analysis, but consideration of the Court's decisions in *Paul v. Davis*, 424 U.S. 969 (1976), and *Hendricks* led the court of appeals to conclude that such indirect effects do not render community notification under Megan's Law punishment. *E.B.*, *supra*, 119 F.3d at 1102-05; App. B at 59a-63a. The court relied upon *Hendricks* and its antecedents for the proposition that "bona fide remedial legislation may inflict very substantial individual hardship without implicating the Ex Post Facto and Double Jeopardy Clauses." *Id.* at 1103; App. B at 62a. Even the dissent was forced to concede the difficulty in prevailing on this effects argument in light of the *Hendricks* precedent. *Id.* at 1126 (Becker, J., dissenting), App. B at 114a-115a.

Hendricks upheld a program of civil commitment that could potentially result in confinement for life. The Court held that such confinement designed to protect the public serves "a legitimate non-punitive governmental objective and has been historically so regarded." *Hendricks*, *supra*, 117 S.Ct. at 2083, *citing United States v. Salerno*, 481 U.S. 739, 746 (1987). The court of appeals found the state interest in community notification to protect the public to be "similar to, and as compelling as, the state interest served by the civil commitment statute in *Hendricks*." *E.B.*, *supra*, 119 F.3d at 1104; App. B at 63a.

Moreover, in contrast to the civil commitment law, Megan's Law merely provides for dissemination of largely public information. It imposes no affirmative restraints. If civil confinement of repetitive sex offenders is not so punitive as to necessarily require classification as "punishment," then there is no legitimate basis for finding the necessary punitive intent or effect in a law that merely provides information in accordance with risk of reoffense to

persons in a position to take precautions. As the court of appeals concluded, "in terms of the impact on the everyday lives of registrants, the burden of this aspect of Megan's Law pales by comparison to the civil commitment of sex offenders sanctioned in *Hendricks*." *E.B.*, *supra*, 119 F.3d at 1105; App. B at 65a.

The court of appeals also considered the "background risk of private violence," and found that the State takes affirmative steps to discourage such acts. The court, like the Second and Ninth Circuit courts, determined that "the risk of private violence stems primarily from a registrant's past criminal activity." *Ibid.*; App. B at 64a. *See also Doe v. Pataki*, 120 F.3d at 1280-81; *Russell v. Gregoire*, 124 F.3d at 1092. The *E.B.* court found that, at most, dissemination of accurate criminal history and risk information by the State "may materially extend the period during which the increased risk of private violence may exist[.]" *E.B.*, *supra*, 119 F.3d at 1105; App. B at 63a-64a. But based on data from 135 notifications completed in New Jersey as well as information from Washington and Oregon, *id.* at 1088-90, the court found that such occurrences are "relatively rare." *Id.* at 1105; App. B at 64a. Accordingly, the court rejected the contention that this indirect effect is sufficiently burdensome to require classification of the law as punitive. *Ibid.*; App. B at 65a.

Based on the foregoing analysis, the court of appeals concluded that neither the "objective purpose" nor the effects of community notification under Megan's Law compel a conclusion that the law is punitive. This conclusion is neither erroneous nor ill-founded. Indeed, the analysis is in accord with the Court's double jeopardy and ex post facto jurisprudence. The court of appeals' thorough consideration and well-reasoned conclusion obviates any need for further review by this Court.

CONCLUSION

For the reasons stated above, the Attorney General of New Jersey respectfully requests that the petition for a writ of *certiorari* be denied.

Respectfully submitted,

PETER VERNIERO
Attorney General of New Jersey
(*Counsel of Record*)

JOSEPH L. YANNOTTI
Assistant Attorney General
RHONDA S. BERLINER-GOLD
B. STEPHAN FINKEL
Deputy Attorneys General
(*On the Brief*)

R.J. Hughes Justice Complex
Post Office Box 080
Trenton, New Jersey 08625
(609) 292-4925

Attorney for Respondent

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No. 97-887

In The

Supreme Court of the United States

October Term, 1997

W.P., *et al.*, Individually and as Representatives of a Class Pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2),

Petitioners,

vs.

PETER VERNIERO, Attorney General of New Jersey, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

MICHAEL Z. BUNCHER
EDWARD L. BAROCAS
New Jersey Office of the
Public Defender
Special Hearings Unit
R.J. Hughes Justice Complex
P.O. Box 850
Trenton, New Jersey 08625
(609) 292-7677

JOHN J. GIBBONS
Counsel of Record
LAWRENCE S. LUSTBERG
KERRIE R. HESLIN
GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE, P.C.
One Riverfront Plaza
Newark, New Jersey 07102-5497
(973) 596-4500

Attorneys for Petitioners

144409

(800) 274-3321 • (800) 359-6859
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STATEMENT

Petitioners here seek review of the decision of the United States Court of Appeals for the Third Circuit holding that the retroactive application of New Jersey's sex offender community notification laws (hereinafter referred to as "Megan's Law") do not violate the Double Jeopardy and Ex Post Facto Clauses of the United States Constitution. *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997), Appendix B ("App. B") to Petition for a Writ of Certiorari (hereinafter "the Petition"). As is argued more fully in the Petition, such review is warranted for several reasons. First, the issue of whether community notification regarding sex offenders constitutes punishment is a question of extraordinary practical and doctrinal importance. Second, there is a split of authority in the lower courts with regard to whether community notification imposes punishment for purposes of the Double Jeopardy and Ex Post Facto Clauses.

Respondents contend that the petition should not be granted because the Court's decision, in *Hudson v. United States*, 118 S. Ct. 488 (1997), fully resolves the jurisprudential mystery regarding the proper test to determine whether a provision imposes punishment for purposes of the Ex Post Facto and Double Jeopardy Clauses. Respondents also argue that there is no conflict between the lower courts' decisions interpreting sex offender notification laws. For the reasons set forth below, petitioners respectfully submit that the Petition should be granted because the Court's decision in *Hudson* does not eviscerate either the practical or the doctrinal reasons why the Court should consider the constitutionality of the retroactive imposition of the many sex offender notification laws that are sweeping the nation. Furthermore, the Court's holding in *Hudson* heightens, rather than eliminates, the conflict between the lower courts' holdings regarding the constitutionality of these laws. Accordingly, certiorari should be granted and the case set for a plenary review.

FURTHER REASONS FOR GRANTING THE WRIT

I. The Court's Decision In *Hudson* Does Not Eviscerate The Doctrinal And Practical Reasons Why This Court Should Consider The Constitutionality Of Sex Offender Notification Laws.

A. The Court's Decision In *Hudson* Does Not Resolve The Issue Of What Test Should Be Applied To Determine Punishment Under The Ex Post Facto Clause.

This Court, in *Hudson*, decided that the proper test to be used to determine whether a civil proceeding constitutes Double Jeopardy under the United States Constitution is the analysis previously utilized by the Court in *United States v. Ward*, 448 U.S. 242, 248-49 (1980), employing the factors listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). *Hudson*, 118 S. Ct. at 493. In so holding, the Court explicitly disavowed the analysis propounded in *United States v. Halper*, 490 U.S. 435, 448 (1989). *Hudson*, 118 S. Ct. at 494. In *Hudson*, as in *Halper* and *Ward*, however, the Court's decision only addressed the question of whether a sanction constitutes punishment under the Double Jeopardy Clause, U.S. CONST., amend. V, and did not comment on the appropriate test to be applied under the Ex Post Facto Clause, U.S. CONST., art. I § 10.

Although the court of appeals assumed that "punishment" has the same meaning under both clauses, App. B at 35a, this Court's position on the issue is much less clear. Indeed, in *United States v. Ursery*, 116 S. Ct. 2135, 2146 (1996), the Court expressly warned against lifting the punishment analysis under the Double Jeopardy Clause and applying it to another constitutional provision, explaining that each constitutional provision must be analyzed separately, in light of the significant differences between the purposes of each provision. *See id.* ("[T]he difference in approach [i]s based in a significant difference between the purposes of our

analysis under each constitutional provision."). The Court has consistently avoided broad, sweeping pronouncements of constitutional interpretation, and has instead reviewed various measures on a case-by-case basis and in light of the particular provision at issue. *Id.* at 2147; *California Dep't of Corrections v. Morales*, 514 U.S. 499, 509 (1995) (declining to articulate a single "formula" for determining whether civil measure falls within the constitutional prohibition against punishment). For example, in *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767 (1994), the Court reviewed a tax proceeding under the Double Jeopardy Clause; in *Austin v. United States*, 509 U.S. 602 (1993), the Court analyzed civil forfeitures under the Excessive Fines Clause; and in *Ursery*, 116 S. Ct. at 2147, the Court dealt with *in rem* civil forfeitures under the Double Jeopardy Clause.[1]

The Court is now presented with another distinct civil measure — sex offender notification — and its constitutionality under both the Double Jeopardy and the Ex Post Facto Clauses. Because *Hudson* does not address the latter, it does not, given this Court's careful jurisprudence, fully resolve the question presented by this Petition. More fundamentally, however, because *Hudson* did not seek to resolve the question of the constitutionality of sex offender notification statutes in particular, it leaves open the question as to which the lower courts are split: may such statutes be retroactively applied? Certiorari should be granted to resolve this pressing issue.

---

1. As noted in the Petition, in *Kansas v. Hendricks*, 117 S. Ct. 2072, 2081-86 (1997), the Court utilized the same analysis for the purposes of evaluating the constitutionality of a civil commitment statute under both the Double Jeopardy and Ex Post Facto Clauses. *See* Petition at 17 n.4. However, just as the Court's holding in *Ursery* was closely tied to the nature of the *in rem* forfeiture there at issue, *Ursery*, 116 S. Ct. at 2142-47, the Court's analysis in *Hendricks* was explicitly based upon the historical understanding of civil commitment. *Hendricks*, 117 S. Ct. at 2080-81. *See also Austin*, 509 U.S. at 606-18 (conducting in-depth historical analysis of *in rem* civil forfeitures to determine if statute violated Excessive Fines Clause).

B. Whether Community Notification Regarding Sex Offenders Constitutes Punishment Remains A Question Of Great Practical Importance, Which Should Be Addressed By This Court.

Respondents do not and cannot deny that this case implicates an issue of the greatest practical importance. As is detailed in the Petition, all fifty states and the federal government have now enacted sex offender registration statutes. *See* Petition at 12-14 & 12 n.3. Given the split of authority as to the constitutionality of these particular provisions, a split that survives this Court's decision in *Hudson*, *see infra* at II, each of these jurisdictions, and the tens of thousands of individuals subjected to these laws, anxiously await the Court's resolution of this critical constitutional and pressing issue. Certiorari must be granted in order to achieve this resolution.

II. The Court's Decision In *Hudson* Heightens Rather Than Eliminates The Conflict Between The Lower Courts Which Have Addressed The Constitutionality Of Sex Offender Notification Provisions.

Respondents assert that there exists no conflict between the decisions of the lower courts as to the constitutionality of retroactive imposition of sex offender notification statutes. Even if this were true, as petitioners submit it is not, this Court's decision in *Hudson* requires that an analysis be utilized which has resulted in lower courts reaching opposite conclusions as to this question. In *Kansas v. Myers*, 923 P.2d 1024, 1043 (Kan. 1996), *cert. denied*, 117 S. Ct. 2508 (1997), the Supreme Court of Kansas held that the application of the *Mendoza-Martinez* factors, as is now required by *Hudson*, supported the conclusion that the public disclosure provisions of the Kansas Sex Offender Registration Act could not be constitutionally imposed retroactively. Indeed, the Kansas court specifically looked to three of the *Mendoza-Martinez* factors — that the statute placed an affirmative disability or restraint on the registrants, that unlimited public access provided a deterrent and retributive

effect, and that the extent to which the information was available to the public was excessive — in concluding that the Kansas law violated the Ex Post Facto Clause because it made "more burdensome the punishment for a crime after its commission." *Id.*

Similarly, the United States District Court for the District of New Jersey, in *Artway v. Attorney General of N.J.*, 876 F. Supp. 666, 688-92 (D. N.J. 1995), *aff'd in part & vacated in part*, 81 F.3d 1235 (3d Cir. 1996), expressly relied upon the *Mendoza-Martinez* test in holding Megan's Law unconstitutional. On appeal, the Third Circuit rejected the district court's legal analysis, adopting instead the three-pronged test derived from this Court's previous decisions in *Halper*, *Austin*, and *Kurth Ranch*. *Artway v. Attorney General of N.J.*, 81 F.3d 1235, 1263 (3d Cir. 1996). This newly synthesized test was then used by the *E.B.* court to uphold the retroactive application of the notification provisions of the statute. *See E.B.*, App. B at 35a-37a.

By contrast, the Second Circuit, in *Doe v. Pataki*, 120 F.3d 1263, 1275, 1284 (2d Cir. 1997), used the *Mendoza-Martinez* factors, but concluded that the notification provisions did not constitute punishment for purposes of the Ex Post Facto Clause. Similarly, in *Russell v. Gregoire*, 124 F.3d 1079, 1087-93 (9th Cir. 1997), the Ninth Circuit applied the *Mendoza-Martinez* factors in holding that the possible effects of notification were not so punitive as to render the law unconstitutional.

It is evident, therefore, that the test adopted by the Court in *Hudson* has resulted, and will continue to result, in conflicting conclusions as to the constitutionality of the retroactive imposition of sex offender notification statutes, and even as to the particular factors most helpful to that analysis. *Compare Myers*, 923 P.2d at 1043 (focusing on only three of the *Mendoza-Martinez* factors: affirmative disability or restraint, deterrent and retributive effect, and excessiveness) *with Russell*, 124 F.3d at 1091-92 (explicitly discussing three different *Mendoza-Martinez* factors: similarity to

the goals of criminal punishment, affirmative disability and restraint, and historical analogies). Far from resolving the conflict cited in the Petition, then, *Hudson* exacerbates it, by prescribing an analysis that has already resulted in lower courts reaching opposite results in relation to identical or nearly identical statutory provisions. Certiorari must be granted to resolve this significant conflict.

Nor, as respondents contend, may the conflict be avoided based upon the factual dissimilarities between the Kansas Sex Offender Registration Act and New Jersey's Megan's Law. To the contrary, as is discussed at length in the Petition, if anything, the practical difference between the notification provisions of the Kansas statute and the New Jersey law illustrate that Megan's Law is far more punitive, and thus, more susceptible to the constitutional challenge brought here. *See* Petition at 25-26.

Specifically, while the Kansas court rested its conclusion of unconstitutionality in part upon the unlimited nature of the access afforded the public to sex offender information, *Myers*, 923 P.2d at 1031, the New Jersey law affirmatively disseminates such information to organizations and residents. *E.B.*, App. B at 10a-11a. The *Myers* Court acknowledged this difference between the laws, *Myers*, 923 P.2d at 1041, but reasoned that the repercussions of notification, *i.e.*, stigma and ostracism, were "great enough under the facts of this case to be considered punishment." *Id.* at 1043. However, these same repercussions, and worse, have consistently been recognized as consequences suffered by individuals subject to the notification provisions of Megan's Law. *See E.B.*, App. B at 71a ("Notification puts the registrant's livelihood, domestic tranquillity, and personal relationships with all around him in grave jeopardy."); *Artway*, 81 F.3d at 1266 ("In addition to the ostracism that is part of its very design, notification subjects [sex offenders] to possible vigilante reprisals and loss of employment."); *Doe v. Poritz*, 662 A.2d 367, 439 (N.J. 1995) (Stein, J., dissenting) ("[O]ne reasonably could anticipate that the notice of the presence of a sex offender will trigger fear, suspicion, hostility, anger, evasive

behavior, ostracism, and in some cases derision, epithets and violence.").

Moreover, those courts that have interpreted Megan's Law have not viewed it as more limited than the Kansas statute, but rather as broader than provisions which allow more public access to an individual's criminal history, *see Artway*, 876 F. Supp. at 689 (stating that public notification under Megan's law goes well beyond provisions which allow public access to an individual's criminal history), and, indeed, as the most "far-reaching" of any such statute. *See Doe v. Poritz*, 662 A.2d at 422 (Megan's Law "sail[s] on truly uncharted waters, for no other state has adopted such a far-reaching statute."). *See also id.* at 428 (Stein, J. dissenting) ("[N]one of the states with retroactive notice provisions provides for notification as extensive as that mandated by New Jersey's statute.").

In sum, the distinction made by respondents between Megan's Law and the Kansas statute in no way eviscerates the very real conflict between the holdings of the courts. Indeed, as discussed above, that conflict, after *Hudson*, is sharper than ever. Accordingly, the petition should be granted.

III. If The Court Determines Not To Resolve This Issue On The Merits, The Court Should Grant The Petition, Vacate The Decision Of The Court Of Appeals, And Remand The Matter For Reconsideration In Light Of The Decision In *Hudson*.

Petitioners respectfully but strenuously urge the Court to grant this Petition in order to bring finality to the important constitutional and practical challenges that Megan's Law and its successor statutes have spawned. In the event, however, that the Court decides not to review the instant matter on the merits, the Court should grant the petition, vacate the judgment of the Third Circuit, and remand the matter for reconsideration ("GVR") in light of this Court's decision in *Hudson*. *See, e.g., Doctor's Assocs., Inc. v. Casarotto*, 515 U.S. 1129 (1995) (granting GVR in light of *Allied-Bruce Terminex*

Cos., Inc. v. Dobson, 513 U.S. 265 (1995)); *Chassin v. NYSA-ILA Med. & Clinical Servs. Fund*, 514 U.S. 1094 (1995) (ordering GVR in light of *New York State Conference of Blue Cross & Blue Shield Plans v. Travellers Ins. Co.*, 514 U.S. 645 (1995)). "Where intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is . . . appropriate." *Lords Landing Village Condo. Council of Unit Owners v. Continental Ins. Co.*, 117 S. Ct. 1731, 1732 (1997) (quotation omitted).

Respondents' argument to the contrary notwithstanding, the court of appeals did not employ the test prescribed by *Hudson* in this case. *See* Brief of Respondents in Opposition to the Petition for a Writ of Certiorari at 7. Rather, the court, having previously rejected the use of the *Mendoza-Martinez* factors in *Artway*, 81 F.3d at 1262 ("[T]he Supreme Court has made it clear that the *Mendoza-Martinez* test is not controlling for the issues in this case."), relied upon a test "divined" from a jurisprudence which this Court has now rejected. *See E.B.*, App. B at 36a (citing *Artway*, 81 F.3d at 1254-63 (stating "*Halper* thus contributes an important element to our analysis")). Because the court of appeals did not have the benefit of that rejection when it determined this matter, and because the only court to have considered Megan's Law using the analysis now prescribed by the Court has found the statute unconstitutional, *see Artway*, 876 F. Supp. at 692, at the very least, petitioners' claims should be remanded to be reviewed under the correct standard, as determined by this Court in *Hudson*.[2]

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2. Respondents argue that the court below used the proper test to decide that the retroactive application of the notification provisions of Megan's Law are constitutional. A review of the court's analysis, as well as respondents' brief, illustrates that this is not the (Cont'd)

(Cont'd)
case. In *E.B.*, the court of appeals employed the test that it had previously divined in its *Artway* decision. *E.B.*, App. B at 36a. The *Artway* court expressly relied on the standard set forth in *Halper*, *Artway*, 81 F.3d at 1256, and specifically rejected the application of the *Mendoza-Martinez* factors, *id.* at 1262, which the Court has now held should govern this analysis. While petitioners acknowledge that the considerations in the Third Circuit's test overlap some of the factors listed in *Mendoza-Martinez*, not all of the factors are taken into consideration by the court of appeals. For example, the Third Circuit did not evaluate the relation of the notification to a sex offender's criminal activity. Nor did the court of appeals fully analyze the similarly between notification and the traditional goals of criminal law. Moreover, the Third Circuit's three-part test necessarily puts emphasis on certain factors, which this Court has stated should be part of a more balanced analysis. *See Hudson*, 118 S. Ct. at 493. Accordingly, at the very least, the Court should issue a GVR order and permit the lower court to review petitioners' constitutional claims under the standard defined in *Hudson*.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition, petitioners respectfully request that the Court grant the writ and reverse the decision of the court below.

Respectfully submitted,

JOHN J. GIBBONS
Counsel of Record
LAWRENCE S. LUSTBERG
KERRIE R. HESLIN
GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE, P.C.
One Riverfront Plaza
Newark, New Jersey 07102-5497
(973) 596-4500

MICHAEL Z. BUNCHER
EDWARD L. BAROCAS
New Jersey Office of the Public Defender
Special Hearings Unit
R.J. Hughes Justice Complex
P.O. Box 850
Trenton, New Jersey 08625
(609) 292-7677

Attorneys for Petitioners